**NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES**

**PUBLIC HEARING NOTICE**

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 1:00 p.m. on Wednesday, December 13, 2006, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court.

Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before December 12, 2006, or may be submitted at the hearing on December 13, 2006. Comments may be e-mailed to the Committee on or before December 12, 2006, at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

**The Committee anticipates that there may be many people who wish to speak at the December 13 public hearing. If so, a time limit may be imposed upon each speaker. Because each speaker's time may be limited, the Committee encourages each speaker to submit written comments,**

**either prior to or at the hearing, to ensure that all of the speaker's comments are provided to the Committee.**

Included among the suggested rule changes are amendments to the Rules of Professional Conduct, which were the subject of an earlier public comment period that ended on September 1, 2006. All comments filed during that public comment period will be considered by the Committee, and need not be filed a second time.

Any suggestions for rules changes other than those set forth below may be submitted in writing to the secretary of the Committee for consideration by the Committee in the future.

Copies of the specific changes being considered by the Committee are available on request to the secretary of the Committee at the N.H. Supreme Court Building, 1 Charles Doe Drive, Concord, New Hampshire 03301 (Tel. 271-2646). In addition, the changes being considered are available on the Internet at:

http://www.courts.state.nh.us/committees/adviscommrules/index.htm

The changes being considered concern the following rules:

## I. Rules Relating to Public Access to Court Records

The following proposal arose out of the Report of the New Hampshire Supreme Court Task Force on Public Access to Court Records:

1. Repeal the current Guidelines for Public Access to Court Records that took effect on December 9, 1992, and adopt new Supreme Court Rule 58 (Appendix A).

## II. Rules of Professional Conduct

The following proposals arose out of the report of the New Hampshire Bar Association Ethics Committee on Revisions to the Rules of Professional Conduct, and a recommendation of the Pro Bono Referral Program to revise Rule 6.1 of the Rules of Professional Conduct.

1. Repeal and replace all of the Professional Conduct Rules (Appendix B).

2. Repeal and replace Professional Conduct Rule 6.1 regarding pro bono service (Appendix C).

## III. Joinder and Severance Rules – Criminal Cases

These proposals would adopt new standards for joinder and severance of criminal cases in the trial courts.

1. Superior Court Rule 97-A re joinder and severance (Appendix D).

2. District Court Rule 2.9-A re joinder and serverance (Appendix E).

## IV. Attorney Discipline System

These proposals amend provisions dealing with monetary sanctions in attorney discipline proceedings.

1. Supreme Court Rule 37 re attorney discipline system (Appendix F).

2. Supreme Court Rule 37A re rules and procedures of the attorney discipline system (Appendix G).

## V. Judicial Conduct Rules

These proposals would adopt on a permanent basis temporary rules now in effect relating to the composition and procedures of the Judicial Conduct Committee, and would amend the Code of Judicial Conduct relative to the ability of retired judges to engage in alternative dispute resolution for compensation in the private sector.

1. Supreme Court Rule 38, Application section, re retired judges (Appendix H).

2. Supreme Court Rule 39 re judicial conduct committee (Appendix I).

## VI. Domestic Relations Rules

These proposals would adopt on a permanent basis temporary domestic relations rules now in effect relating to forms, parenting plans, divorce decrees, etc. These rules are modeled upon similar Family Division Rules currently in effect.

1. Superior Court Rules 201 to 202-E re domestic relations (Appendix J).

## VII. Public Protection Fund Rules

This proposal would amend the appeal procedure for appeals from decisions by the committee administering the Public Protection Fund.

1. Supreme Court Rule 55(5) re public protection fund (Appendix K).

## VIII. Supreme Court Procedural Rules

This proposal is to adopt on a permanent basis the current rule allowing parties to obtain automatic extensions of time to file briefs in the supreme court.

1. Supreme Court Rule 21(6-A) re automatic extensions of time (Appendix L).

New Hampshire Supreme Court
Advisory Committee on Rules

By: Linda S. Dalianis, Chairperson
and David S. Peck, Secretary

October 31, 2006

**APPENDIX A**

Repeal the current Guidelines for Public Access to Court Records that took effect on December 9, 1992, and adopt the following new Supreme Court Rule 58:

## RULE 58. GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS

### PREAMBLE

In October 2002, the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) published model guidelines for public access to court records, entitled, Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts (CCJ/COSCA Guidelines). This rule uses the organization of the CCJ/COSCA Guidelines as a guide, and is divided into the following subsections:

-- Purpose (Section1.00)

-- Access by Whom (Section 2.00)

-- Access to What (Sections 3.00 & 4.00)

-- When Accessible (Section 5.00)

-- Fees (Section 6.00)

-- Obligation of vendors (Section 7.00)

-- Obligation to inform and educate (Section 8.00)

In June 2004, the New Hampshire Supreme Court established the Task Force on Public Access to Court Records (Task Force) and charged it with reviewing and recommending new rules of public access to court records. This rule is the result of that review. The relevant CJJ/COSCA commentary, which is incorporated by reference, is reprinted at the end of this rule. To the extent that the Task Force departed from the CCJ/COSCA template or to the extent that the Task Force believed that additional New Hampshire emphasis or commentary was appropriate, it has provided that commentary as set forth in this rule.

(I) **Section 1.00 – Purpose of these Guidelines**

(a) The purpose of these Guidelines is to provide a comprehensive framework for a policy on public access to court records. These Guidelines provide for access in a manner that:

(1) Maximizes accessibility to court records when available resources make it feasible for the judicial branch to do so;

(2) Supports the role of the judiciary;

(3) Promotes governmental accountability;

(4) Contributes to public safety;

(5) Minimizes the risk of injury to individuals;

(6) Makes most effective use of court and clerk of court staff;

(7) Provides excellent service to information users; and

(8) Does not unduly burden the ongoing business of the judiciary.

(b) These Guidelines are intended to provide guidance to: (1) litigants; (2) those seeking access or limitation of access to court records; and (3) judges and court and clerk of court personnel responding to requests for access or requests to limit access.

*Task Force Commentary*

The Task Force adopted Section 1.00 of the CCJ/COSCA Guidelines with only minor revisions. Although the COSCA Guidelines refer to providing "excellent customer service," the Committee believed that the word "customer" was inappropriate as it implied that courts serve only paying "customers." The purpose of this subsection is to make clear that an access policy should provide opportunities for easier, more convenient, less costly access to anyone interested in the information and should also provide a clear and understandable process for those seeking to limit access to particular court records. In addition, an access policy should require court personnel to treat all who seek access to court records with respect.

(II) **Section 2.00 – Who Has Access Under These Guidelines**

(a) Every member of the public will have the same access to court records as provided in these Guidelines, except as provided in section 4.30(b) and 4.40(b).

(b) "Public" includes:

(1) any person and any business or non-profit entity, organization or association; and

(2) any governmental agency for which there is no existing policy defining the agency's access to court records.

(c) "Public" does not include:

(1) court or clerk of court employees;

(2) people or entities, private or governmental, who assist the court in providing court services;

(3) public agencies whose access to court records is defined in another statute, rule, order or policy; and

(4) the parties to a case or their lawyers regarding access to the court record in their case.

*Task Force Commentary*

The Task Force adopted Section 2.00 with only minor revisions. The CCJ/COSCA Guidelines specifically define "Public" to include media organizations and commercial information providers. The Task Force believed it unnecessary to define "Public" to include these types of organizations. The point of this section is to make explicit that all members of the public have the same right of access to court records, including, without limitation, individuals, members of the media, and the information industry.

(III) **Section 3.00 – Definitions**

(A) **Section 3.10** – Definition of Court Record

For the purposes of these Guidelines:

(a) "Court record" includes:

(1) Any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;

(2) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree,

judgment, and any information in a case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding; and

(3) The following information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court office and not associated with any particular case.

*[List to be added prior to enactment]*

(b) "Court record" does not include:

(1) Other records maintained by the public official who also serves as clerk of court.

(2) Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in section 3.10(a)(1).

(B) **Section 3.20** – Definition of Public Access

"Public access" means that the public may inspect and obtain a copy of the information in a court record.

(C) **Section 3.30** – Definition of Remote Access

"Remote access" means the ability electronically to search, inspect, or copy information in a court record without the need to visit physically the court facility where the court record is maintained.

(D) **Section 3.40** – Definition of "In Electronic Form"

Information in a court record "in electronic form" includes information that exists as:

(a) electronic representations of text or graphic documents;

(b) an electronic image, including a video image, of a document, exhibit or other thing;

(c) data in the fields of files of an electronic database; or

(d) an audio or video recording, analog or digital, of an event or notes in electronic form from which a transcript of an event can be prepared.

(IV) **Section 4.00 – Applicability of Rule**

Except where noted, these Guidelines apply to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.

(A) **Section 4.10** – General Access Rule

(a) Information in the court record is accessible to the public except as prohibited by section 4.60 or section 4.70(a).

(b) There shall be a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication shall not disclose the nature of the information protected.

(B) **Section 4.20** – Court Records In Electronic Form Presumptively Subject to Remote Access by the Public

When available resources make it feasible for the judicial branch to do so, the following information in court records should be made remotely accessible to the public if it exists in electronic form, unless public access is restricted pursuant to sections 4.50, 4.60 or 4.70(a):

(a) Litigant/party indexes to cases filed with the court;

(b) Listings of new case filings, including the names of the parties;

(c) Register of actions showing what documents have been filed in a case;

(d) Calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing;

(e) Judgments, orders, or decrees in a case and liens affecting title to real property.

(C) **Section 4.30** – Access to Bulk Downloads of and Compiled Information from Filtered Database

(a) Definitions

(1) “Bulk Download” is a distribution of all case management system records, as is and without modification or compilation.

(2) “Compiled Information” is information derived from manipulating the case management system in some way, either through filtering so that only particular records are included, or through editing or redaction.

(3) “Filtered Database” is a database of case management system records in which fields containing “personal identifiers” have been encrypted.

(4) “Unfiltered Database” is a database of case management system records in which fields containing “personal identifiers” have not been encrypted.

(5) “Personal Identifiers” include, but are not limited to: name, street address, telephone number, e-mail address, employer’s name and street address, month and day of birth, driver’s license number, personal identification number, FBI number, State identification number, and social security number.

(6) “Affected Person” is a person whose personally identifying information the court has been requested to disclose.

(b) When available resources make it feasible for the judicial branch to do so, Bulk Downloads and Compiled Information will be available to the public as follows:

(1) The court will post on the Internet and periodically update the Filtered Database. Members of the public may download data from the filtered database without restriction.

(2) Through individual queries, members of the public may compile information from the filtered database as desired.

(3) Except as set forth in section 4.40(f), any member of the public who would like a bulk download of or compiled information from a database of case management system records in which one or more of the fields containing personal identifiers is not encrypted may file a request for this information with the Supreme Court, or its designee, as set forth in section 4.40.

*Task Force Commentary*

The Task Force significantly redrafted Section 4.30 of the CCJ/COSCA Guidelines because of its concerns about permitting public access to data downloaded in bulk that contains personally identifying information. While the

Task Force appreciates that data downloaded in bulk may have substantial value to legitimate researchers, the Task Force believes it imperative to protect the privacy of individuals about whom the court has collected data. After much debate, a majority of the Task Force recommends that the court make a case management system database available to the public that contains only very limited personally identifying information about individuals.

One area of debate was whether personal identifiers should be redacted or encrypted. Redacted information would be of no use to legitimate researchers. Encrypted information would provide some privacy protection, but allow researchers to match records based on the consistency of the encryption. The Task Force majority believed that an individual's privacy interest would not be unduly compromised by encrypting the data. The majority also recognized the benefit of the information to enhance accountability and foster research. The proposed rule therefore states that personal identifiers will be encrypted rather than redacted.

A minority of the Task Force members believe that this recommendation does not achieve the right balance between allowing public access to public court records and protecting the legitimate privacy interests of those involved in the legal system. These Task Force members disagree that individuals have a legitimate privacy interest in protecting against the disclosure of personal information, such as their names, addresses and telephone numbers. These Task Force members believe also that without case docket number information, information from the Filtered Database is of limited utility. Without case docket numbers, individuals who download information from the Filtered Database are unable to correlate that information with individual cases. These Task Force members believe that the ability to link information to individual cases allows members of the public to use the information to ensure judicial accountability.

(D) **Section 4.40** – Access to Bulk Downloads of and Compiled Information from Unfiltered Database

(a) A request for a bulk download of or compiled information from a database of case management system records in which one or more of the fields containing personal identifiers is not encrypted must be in writing and must contain the following information:

(1) name, address, telephone number, fax number, e-mail address, organizational affiliation and professional qualifications of the person requesting information;

(2) the specific information sought;

(3) the purpose for which the information is sought;

(4) a description of how the release of the information sought will promote or contribute to one or more of the following public interests:

(i) governmental accountability;

(ii) the role of the judiciary;

(iii) public knowledge of the judicial system;

(iv) effectiveness of the judicial system;

(v) public safety.

(5) the procedures that will be followed to maintain the security of the data provided such as using physical locks, computer passwords or encryption;

(6) the names and qualifications of additional research staff, if any, who will have access to the data; and

(7) the names and addresses of any other individuals or organizations who will have access to the data.

(b) The Supreme Court, or its designee, may grant the request filed pursuant to section 4.40(a) if it determines that:

(1) the release of the requested information will serve one or more of the public interests set forth in section 4.40(a)(4)(i) through (v);

(2) the risk of injury to individual privacy rights will be minimized;

(3) the request does not unduly burden the ongoing business of the judiciary;

(4) the request makes effective use of court and clerk staff; and

(5) the resources are available to comply with the request.

(c) If the court, or its designee, grants a request, the requester will be required to sign a declaration, under penalty of perjury, that:

(1) The data will not be sold to third parties;

(2) The data will not be used by or disclosed to any person or organization other than as described in the application;

(3) The information will not be used directly or indirectly to sell a product or service to an individual or the general public;

(4) There will be no copying or duplication of the information provided other than for the stated purpose for which the requester will use the information.

(d) Before releasing the requested information, the court shall notify affected persons as follows:

(1) The requester must provide the court with a draft order that notifies affected persons of the bulk download/compiled information request and its purpose and that describes how the requester intends to use requested information.

(2) The court shall review the draft order and, if appropriate, adopt it as an order of the court and send it to all persons affected by the release of the requested information and will inform them that if they object to the release of the information, they must notify the court within a specified time. If the order is returned as undeliverable or an affected person objects to the release of the requested information, personal identifying information about that person shall not be released.

(3) The court shall require the requester to pay a fee to cover the cost of mailing and processing.

(e) If the court, or its designee, grants a request made under section 4.40(a), it may make such additional orders as may be necessary to recover costs or protect the information provided, which may include requiring the requester to post a bond.

(f) Section 4.40(a) does not apply to for-profit data consolidators and re-sellers. For-profit data consolidators and re-sellers shall not, under any circumstances, obtain a bulk download of or compiled information from case management system records that are not publicly accessible on the Internet.

*Task Force Commentary*

This is a significant rewrite of Section 4.40 of the CCJ/COSCA Guidelines. A majority of the Task Force recommends that the court implement the stringent process established in this rule governing the process by which researchers and other members of the public may request and

possibly obtain access to data downloaded in bulk that contains personal identifying information about individuals. The proposed rule reflects the outcome of extensive discussions as to what should be the default position when an individual fails to respond to the notice that his or her "personal identifiers" have been requested to be disclosed. Some Task Force members believed that if an individual failed to respond to the notice, information about that individual should not be disclosed, while other Task Force members believed that the failure to respond operated as a waiver of any objections to the disclosure. Ultimately, the majority agreed that privacy would not be unduly compromised if an individual is given appropriate notice and an opportunity to "opt out."

A minority of the Task Force believes that the process Section 4.40 describes is overly cumbersome and unnecessarily protective of individual privacy rights. Some members of the Task Force minority had additional concerns.

Several Task Force members questioned whether the Supreme Court should be the entity that decides whether to permit access to data from the Unfiltered Database. One Task Force member posited that to avoid any appearance of bias or impropriety, this task should be undertaken by an entity that is outside the judicial system. Another Task Force member suggested that the Supreme Court be available to decide disputes involving access to data from the Unfiltered Database, but that the initial decision about access should be made by an entity other than the Supreme Court.

One Task Force member suggested that the notification process set forth in Section 4.40(d) should not apply if a researcher requests only the names of individual litigants and does not request that these names be correlated with any other private information. With the names, the researcher will then be able to conduct individual queries using the case management system database on the Internet or at the courthouse. This observer reasoned that when litigant name is correlated only with publicly available information, such as the case management system data on the Internet, the individual does not have a legitimate privacy interest in protecting against disclosure of his or her name.

Several Task Force members expressed concern that the Supreme Court lacks the resources to keep track of who responded or did not respond to notice.

(E) **Section 4.50** – Court Records That Are Only Publicly Accessible At a Court Facility

(a) The following information in a court record will be publicly accessible, consistent with the ongoing business of the court, only at a court facility in the jurisdiction, unless access is prohibited pursuant to sections 4.60 or 4.70:

(1) All pleading, other filing and data entries made within ten (10) days of filing or entry to allow parties or other affected persons a ten (10) day opportunity to request sealing or other public access treatment;

(2) Names of jurors;

(3) Exhibits;

(4) Pre-trial statements in civil proceedings and witness lists in all proceedings;

(5) Documents containing the name, address, telephone number, and place of employment of any non-party in a criminal or civil case, including victims in criminal cases, non-party witnesses, and informants, but not including expert witnesses; and

(6) All pleadings not otherwise addressed in these rules in all cases until the court system has the means to redact certain information or exclude certain documents in some automated fashion.

*Task Force Commentary*

The Task Force recognizes that paper pleadings are, for the most part, already public and does not intend these rules to provide for any additional restrictions. A majority of the Task Force favors maintaining the "practical obscurity" inherent in paper records by ensuring that the information and documents described in Section 4.50 are available only at the courthouse, and not on the Internet. A strong minority of the Task Force favors recommending that pleadings and, in particular, court orders and opinions, be made available on the Internet as soon as the technology is available to do so with appropriate redactions for private or confidential information.

(F) **Section 4.60** – Court Records Excluded from Public Access

(1) The following information in a court record is not accessible to the public:

(a) Information that is not to be accessible to the public pursuant to federal law;

(b) Information that is not to be accessible to the public pursuant to state law, court rule or case law, including but not limited to the following:

(i) records pertaining to juvenile delinquency and abuse neglect proceedings;

(ii) financial affidavits in divorce proceedings;

(iii) pre-sentence investigation reports;

(iv) records pertaining to termination of parental rights proceedings;

(v) records pertaining to adopting proceedings; and

(vi) records pertaining to guardianship proceedings; records pertaining to mental health proceedings; and

(c) Other information as follows:

(i) records sealed by the court;

(ii) social security numbers;

(iii) juror questionnaires;

(iv) Case Management System fields, if any, depicting street address, telephone number, social security number, State identification number, driver's license number, fingerprint number, financial account number, and place of employment of any party or non-party in a criminal or civil case, including victims in criminal cases, nonparty witnesses, and informants;

(v) internal court documents, such as law clerk memoranda;

(vi) Case Management System fields, if any, depicting the name of any non-party; and

(vii) Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, or Personal Identification Numbers (PINs) of individuals.

(2) A member of the public may request the court to allow access to information excluded under this provision as provided for in section 4.40(a).

*Task Force Commentary*

Most of the Task Force agreed that the information described in Section 4.60 should not be available to the public. A few Task Force members believe that non-party witness names, addresses and telephone numbers should be publicly available, preferably on the Internet. These Task Force members disagree that non-party witnesses have a legitimate privacy interest in protecting against disclosure of their names, addresses and telephone numbers.

(G) **Section 4.70** – Requests To Prohibit Public Access to Information In Court Records Or To Obtain Access to Restricted Information

(a) A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. The court must decide whether there are sufficiently compelling reasons to prohibit access according to applicable constitutional, statutory and common law. In deciding this, the court should consider at least the following factors:

(1) The availability of reasonable alternatives to nondisclosure;

(2) Risk of injury to individuals;

(3) Individual privacy rights and interests;

(4) Proprietary business information; and

(5) Public safety.

In restricting access the court will use the least restrictive means that will achieve the purposes of the access policy and the needs of the requestor.

(b) A request to obtain access to information in a court record to which access is prohibited under section 4.60 or 4.70(a) of these Guidelines may be made by any member of the public or on the court's own motion upon notice as provided in subsection 4.70(c). The court must decide whether there are sufficiently compelling reasons to continue to prohibit access according to applicable constitutional, statutory and common law. In deciding this, the court should consider at least the following factors:

(1) The public's right of access to court records;

(2) The availability of reasonable alternatives to nondisclosure;

(3) Individual privacy rights and interests;

(4) Proprietary business information;

(5) Risk of injury to individuals; and

(6) Public safety.

(c) The request shall be made by a written motion to the court. The requestor will give notice to all parties in the case except as prohibited by law. The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under section 4.70(a), the court will provide notice to the individual or entity that requested that access be prohibited either itself or by directing a party to give the notice.

## (V) **Section 5.00 – When Court Records May Be Accessed**

(a) Court records will be available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.

(b) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time, consistent with the ongoing business of the court.

## (VI) **Section 6.00 – Fees for Access**

[Reserved]

## (VII) **Section 7.00 – Obligations Of Vendors Providing Information Technology Support To A Court To Maintain Court Records**

[Reserved]

## (VIII) **Section 8.00 – Information and Education Regarding Access Policy**

(A) **Section 8.10** – Dissemination of Information to Litigants About Access To Information In Court Records

The court will make information available to litigants and the public that information in the court record about them is accessible to the public,

including remotely and how to request to restrict the manner of access or to prohibit public access.

*Task Force Commentary*

The Task Force firmly believes that before the court implements any rule changes with respect to public access to court information, it must thoroughly educate litigants and the public about what court record information is public and how it may be accessed or protected both remotely and at individual courthouses. Members of the bar should also be educated about these issues through the New Hampshire Bar Association.

(B) **Section 8.20** – Dissemination of Information To The Public About Accessing Court Records

The Court will develop and make information available to the public about how to obtain access to court records pursuant to this rule.

(C) **Section 8.30** – Education of Judges and Court Personnel About Access Policy

The Court and clerk of court will educate and train their personnel to comply with the access policy established in this rule so that the Court and clerk of court offices respond to requests for access to information in the court record in a manner consistent with this policy. The Presiding Judge shall insure that all judges are informed about the access policy.

(D) **Section 8.40** – Education About Process To Change Inaccurate Information in A Court Record

The Court will have a policy and will inform the public of the policy by which the court will correct inaccurate information in a court record.

## CCJ/COSCA RECOMMENDATIONS AND COMMENTARY

## Purpose

**Section 1.00 - Purpose of the *CCJ/COSCA Guidelines***

**(a) The purpose of these *CCJ/COSCA Guidelines* is to provide a comprehensive framework for a policy on public access to court records. The *CCJ/COSCA Guidelines* provide for access in a manner that:**

**(1) Maximizes accessibility to court records,**

**(2) Supports the role of the judiciary,**

**(3) Promotes governmental accountability,**

**(4) Contributes to public safety,**

**(5) Minimizes risk of injury to individuals,**

**(6) Protects individual privacy rights and interests,**

**(7) Protects proprietary business information,**

**(8) Minimizes reluctance to use the court to resolve disputes,**

**(9) Makes most effective use of court and clerk of court staff,**

**(10) Provides excellent customer service, and**

**(11) Does not unduly burden the ongoing business of the judiciary.**

**(b) The *CCJ/COSCA Guidelines* are intended to provide guidance to 1) litigants, 2) those seeking access to court records, and 3) judges and court and clerk of court personnel responding to requests for access.**

*Commentary*

The objective of these *CCJ/COSCA Guidelines* is to provide maximum public accessibility to court records, consistent with constitutional or other provisions of law and taking into account public policy interests that are not always fully compatible with unrestricted access. Eleven significant public policy interests are identified. Unrestricted access to certain information in court records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses. Denial of access would compromise the judiciary's role in society, inhibit accountability, and might endanger public safety.

These *CCJ/COSCA Guidelines* start from the presumption of open public access to court records. In some circumstances, however, there may be sound reasons for restricting access to these records. Examples where there have historically been access restrictions include juvenile, mental health and grand jury proceedings. Additionally, certain interests, like right to privacy, may sometimes justify restricting access to certain court records. The *CCJ/COSCA Guidelines* also reflect the view that any restriction to access must be

implemented in a manner narrowly tailored to serve the interests in open access. How these issues interact varies from state to state.

It is not the intent of these *CCJ/COSCA Guidelines* to either attempt to summarize the current state of the law, or propose specific changes in the law applicable in each of the several states. Many members of the Advisory Committee expressed the view that the presumption of openness is constitutionally based, requiring a "compelling interest" to overcome the presumption. Other members expressed the view that the law in this area is evolving. The Joint Court Management of CCJ and COSCA took the position that, because the issue may well come before courts of last resort, the *CCJ/COSCA Guidelines* should not take a position as to the applicable legal standard. Rather, the intent of specifying the purposes in this section is to articulate those interests that might be relevant in determining whether there might be restrictions to open public access to information in a court record in a particular situation and how to implement minimal restrictions to access most efficiently. As noted in the introduction, a state or individual court should carefully review its existing laws, rules and policies regarding all judicial records when developing or revising its access policy.

Subsection (a)(1) Maximizes Accessibility to Court Records. The premise underlying these *CCJ/COSCA Guidelines* is that court records should generally be open and accessible to the public. Court records have historically been open to public access at the courthouse, with limited exceptions. This tradition is continued in the *CCJ/COSCA Guidelines*. Open access serves many public purposes. Open access supports the judiciary in fulfilling its role in our democratic form of government and in our society. Open access also promotes the accountability of the judiciary by readily allowing the public to monitor the performance of the judiciary. Other specific benefits of open court records are further elaborated in the remaining subsections.

Subsection (a)(2) Supports the Role of the Judiciary. The role of the judiciary is to resolve disputes, between private parties or between an individual or entity and the government, according to a set of rules. Although the dispute is between two people or entities, or with the government, having the process and result open to the public serves a societal interest in having a set of stable, predictable rules governing behavior and conduct. The open nature of court proceedings furthers the goal of providing public education about the results in cases and the evidence supporting them.

Another aspect of the court's dispute resolution function is establishing rights as between parties in a dispute. The decision of the court stating what the rights and obligations of the parties are is as important to the public as to the litigants. The significance of this role is reflected in statutes and rules creating such things as judgment rolls and party indices with specific public accessibility.

Subsection (a)(3) Promotes Government Accountability. Open court records provide for accountability in at least three major areas: 1) the operations of the judiciary, 2) the operations of other governmental agencies, and 3) the enforcement of laws. Open court records allow the public to monitor the performance of the judiciary and, thereby, hold it accountable. Public access to court records allows anyone to review the proceedings and the decisions of the court, individually, across cases, and across courts, to determine whether the court is meeting its role of protecting the rule of law, and does so in a cost effective manner. Such access also promotes greater public trust and confidence in the judiciary. Openness also provides accountability for governmental agencies that are parties in court actions, or whose activities are being challenged in a court action. Finally, open court proceedings and open court records also demonstrate that laws are being enforced. This includes civil regulatory laws as well as criminal laws.

Subsection (a)(4) Contributes to Public Safety. Open public access contributes to public safety and compliance with the law. Availability of information about court proceedings and outcomes allows people to become aware of and watch out for people, circumstances or business propositions that might cause them injury. Open public access to information thus allows people to protect themselves. Examples of this are criminal conviction information, protective order information, and judgments in non-criminal cases. At the same time it should be noted that there might be a problem with reliance on incomplete information from yet unresolved cases, where allegations might not be proved. Further, the reliance on court records for information about an individual, where positive identification cannot be verified, may also create problems for an individual incorrectly associated with a particular court record.

Public safety, physical and economic, is also enhanced to the extent open public access to court records contributes to the accountability of corporations, businesses and individuals. Court cases are one source of information about unsafe products, improper business practices or dangerous conditions. Knowing this information is readily availability to the public from court records is one incentive for businesses and individuals to act appropriately. Open access to this information also allows individuals and businesses to better protect themselves from injury.

Subsection (a)(5) Minimizes Risk of Injury to Individuals. Other circumstances suggest unrestricted access is not always in the public interest. The interest in personal safety can be served by restricting access to information that someone could use to injure someone else, physically, psychologically or economically. Examples of actual injury to individuals based on information obtained from court records include: intimidation of, or physical violence towards, victims, witnesses, or jurors, repeated domestic violence, sexual assault, stalking, identity theft, and housing or employment

discrimination. While this does not require total restriction of access to court records, it supports restriction of access to certain information that would allow someone to identify and find a person to whom they intend harm. This is an especially serious problem in domestic violence cases where the abused person is seeking protection through the court.

Subsection (a)(6) Protects Individual Privacy Rights and Interests. The major countervailing public interest to open public access is the protection of personal privacy. The interest in privacy is protected by limiting public access to certain kinds of information. The presumption of public access is not absolute. Considerations identified regarding privacy interests include: a specific, legally protected privacy interest, the reasonableness (personally and objectively) of the expectation of privacy, the seriousness of the invasion of privacy, and the legitimate public interest in disclosure.

Appropriate respect for individual privacy also enhances public trust and confidence in the judiciary.

It is also important to remember that, generally, at least some of the parties in a court case are not in court voluntarily, but rather have been brought into court by plaintiffs or by the government. They have not consented to personal information related to the dispute being in the public domain. For those who have violated the law or an agreement, civilly or criminally, an argument can be made that they have impliedly consented to participation and disclosure by their actions. However, both civil suits and criminal cases are filed based on allegations, so innocent people and those who have not acted improperly can still find themselves in court as a defendant in a case.

Finally, at times a person who is not a party to the action may be mentioned in the court record. Care should be taken that the privacy rights and interests of such a 'third' person is not unduly compromised by public access to the court record containing information about the person.

Subsection (a)(7) Protects Proprietary Business Information. Another type of information to which access may be restricted is that related to the operations of a business. There may be a compelling reason to protect trade secrets or other proprietary business information in a particular case. Allowing public access to such information could both thwart a legitimate business advantage and give a competitor an unfair business advantage. It also reduces the willingness of a business to use the courts to resolve disputes. States generally have laws about this, usually involving a case-by-case analysis by a judge at the request of one of the parties.

Subsection (a)(8) Minimizes Reluctance To Use The Court To Resolve Disputes. The public availability of information in the court record can also affect the decision as to whether to use the court to resolve disputes. A policy

that permits unfettered public access might result in some individuals avoiding the resolution of a dispute through the court because they are unwilling to have information become accessible to the public simply by virtue of it being in the court record. This would diminish access to the courts and undermine public confidence in the judiciary. There may also be an unintended effect of encouraging use of alternative dispute resolution mechanisms, which tend to be essentially private proceedings. If someone believes the courts are not available to help resolve their dispute, there is a risk they will resort to self-help, a response the existence of the courts is intended to minimize because of the societal interest in the peaceful resolution of disputes.

Subsection (a)(9) Makes Most Effective Use of Court and Clerk of Court Staff. This consideration relates to how access is provided rather than whether there is access. Staff time is required to maintain and provide public access to court records. If records are in electronic form, less staff time may be needed to provide public access. However, there can be significant costs to convert records to electronic form in the first place and to maintain them. There may also be added costs for court personnel needed to provide appropriate security for court databases and to prevent hackers from improperly accessing and altering court databases. These additional staff costs may at least partially offset any savings from improvements in workflow or from less use of staff time to respond to records requests. In providing public access the court and clerk should be mindful of doing it in a way that makes most effective use of court and clerk of court staff. Use of staff may also be a relevant consideration in identifying the method for limiting access under section 4.70(a). Note that the *CCJ/COSCA Guidelines* do not require a court to convert records to electronic form, nor to make electronic records available remotely.

The design of electronic databases used by the court is also relevant here. Court records management systems should be designed to improve public access to the court record as well as to improve the productivity of the court's employees and judges and the clerk's office. What is the added cost of providing both? The answer to this involves allocation of scarce resources as well as system design issues. If the public can help themselves to access, especially electronically, less staff time is needed to respond to requests for access. The best options would be to design a system to accommodate access restrictions to certain kinds of information without court staff involvement (see discussion in Commentary to Section 3.20).

Subsection (a)(10) Provides Excellent Customer Service. An access policy should also support excellent customer service while conserving court resources, particular court staff. Having information in electronic form offers more opportunities for easier, less costly access to anyone interested in the information. This consideration relates to how access is provided rather than whether there is access.

Subsection (a)(11) Does Not Unduly Burden The Ongoing Business Of The Judiciary. Finally, an access policy and its implementation should not unduly burden the court in delivering its fundamental service – resolution of disputes. This consideration relates to how access is provided rather than whether there is access. Depending on the manner of public access, unrestricted public access could impinge on the day-to-day operations of the court. This subsection relates more to requests for bulk access (see section 4.30) or for compiled information (see section 4.40) than to the day-to-day, one at a time requests (see section 1.00, subdivision (a)(9)). Limited public resources and high case volume also suggest that courts should not add to their current information burden by collecting information not needed for immediate judicial decisions, even if the collection of this information facilitates subsequent use of the collected information. Making information available in electronic form, and making it remotely accessible, requires both staff and equipment resources. Courts receive a large volume of documents and other materials daily, and converting them to electronic form may be expensive. As is the case with all public institutions courts have limited resources to perform their work. The interest stated in this subsection attempts to recognize that access is not free, that there may be more than one approach to providing, or restricting access, and some approaches are less burdensome than others.

## Access By Whom

**Section 2.00 – Who Has Access Under These *CCJ/COSCA Guidelines***

**Every member of the public will have the same access to court records as provided in these *CCJ/COSCA Guidelines*, except as provided in section 4.30(b) and 4.40(b).**

**"Public" includes:**

**(a) any person and any business or non-profit entity, organization or association;**

**(b) any governmental agency for which there is no existing policy defining the agency's access to court records;**

**(c) media organizations; and**

**(d) entities that gather and disseminate information for whatever reason, regardless of whether it is done with the intent of making a profit, and without distinction as to nature or extent of access.**

**"Public" does not include:**

**(e) court or clerk of court employees;**

**(f) people or entities, private or governmental, who assist the court in providing court services;**

**(g) public agencies whose access to court records is defined by another statute, rule, order or policy; and**

**(h) the parties to a case or their lawyers regarding access to the court record in their case.**

*Commentary*

The point of this section is to explicitly state that access is the same for the general public, the media, and the information industry. Access does not depend on who is seeking access, the reason they want the information or what they are doing with it. Although whether there is access does not vary, how access is permitted may vary by type of information (see sections 4.20 to 4.70). The exceptions to equal access referred to (sections 4.30(b) and 4.40(b)) permit requests for greater access by an individual or entity based on specified intended uses of the information.

The section also indicates what groups of people are not subject to the policy, as there are other policies describing their access.

How the equality of access implied in this section is achieved is addressed in section 3.20 and the associated commentary.

Subsection (b) and (g): The *CCJ/COSCA Guidelines* apply to governmental agencies and their staff where there is no existing law specifying access to court records for that agency, for example a health department. Under subsection (g), if there are other applicable access rules, those rules apply.

Subsection (d): This subsection explicitly includes organizations in the information industry, watchdog groups, non-governmental organizations, academic institutions, private investigators, and other organizations sometimes referred to as information providers.

Subsections (e) through (h) identify groups whose authority to access court records is different from that of the public. The concept is that other laws or policies define the access authority for these groups, and these *CCJ/COSCA Guidelines* therefore do not apply.

Subsection (e): Court and clerk of court employees may need greater access than the public does to do their work and therefore work under different

access rules. Courts should adopt an internal policy regarding court and clerk of court employee access and use of information in court records, including the need to protect the confidentiality of information in court records. See section 8.30 about the court's obligation to educate its employees about their access policy applicable to the public.

Subsection (f): Employees and subcontractors of entities who provide services to the court or clerk of court, that is, court services that have been "outsourced," may also need greater access to information to do their jobs and therefore operate under a different access policy. See section 7.00 about policies covering staff in entities that are providing services to the court to help the court conduct its business.

Subsection (g): This subsection is intended to cover personnel in other governmental agencies who have a need for information in court records in order to do their work. Generally there is another statute, rule or policy governing their access to court records and these *CCJ/COSCA Guidelines* do not apply to them. An example of this would be an integrated justice system operated on behalf of several justice system agencies where access is governed by internal policies or statutes or rules applicable to all users of the integrated system.

Subsection (h): This subsection continues nearly unrestricted access by litigants and their lawyers to information in their own case, but no higher level of access to information in other cases. Note that the *CCJ/COSCA Guidelines* do not preclude the court from providing different means of access for parties and their attorneys to their own case, for example remote access, which is not provided to the general public. As to cases in which they are not the attorney of record, attorneys would have the same access as any other member of the public.

## Access to What

**Section 3.00 – Definitions**

**Section 3.10 – Definition Of Court Record**

**For purposes of these *CCJ/COSCA Guidelines*:**

**(a) "Court record" includes:**

**(1) Any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;**

**(2) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding; and**

**(3) The following information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court office and not associated with any particular case.**

**[Include a list of court administrative records and information to be considered part of the court record for purposes of this policy.]**

**(b) "Court record" does not include:**

**(1) Other records maintained by the public official who also serves as clerk of court.**

**[Court should identify and list non-court records, for example: land title records, vital statistics, birth records, naturalization records and voter records];**

**(2) Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in section 3.10(a)(1).**

*Commentary*

This section defines the court record broadly. Three categories of information to which the *CCJ/COSCA Guidelines* apply are identified. First are the documents, etc., that constitute what is classically called the case file. The second category is information that is created by the court, some of which becomes part of the court file, but some resides only in documents or databases that are not in a case file. The third category is information that relates to the operation of the court, but not to a specific case or cases. The definition deals with what is in the record, not whether the information is accessible. Limitations and exclusions to access are provided for in sections 4.50, 4.60, and 4.70.

These *CCJ/COSCA Guidelines* are intended to apply to every court record, regardless of the manner in which it was created, the form(s) in which it is stored, or other form(s) in which the information may exist (see section 4.00).

Subsection (a)(1): This definition is meant to be all inclusive of information that is provided to, or made available to, the court that relates to a judicial proceeding. The term "judicial proceeding" is used because there may not be a court case in every situation. The definition is not limited to information "filed" with the court or "made part of the court record" because some types of information the court needs to make a fully informed decision may not be "filed" or technically part of the court record. The language is, therefore, written to include information delivered to, or "lodged" with, the court, even if it is not "filed." An example is a complaint accompanying a motion to waive the filing fee based on indigency.

The definition is also intended to include exhibits offered in hearings or trials, even if not admitted into evidence. One issue is with the common practice in many courts of returning exhibits to the parties at the conclusion of the trial, particularly if they were not admitted into evidence. These policies will have to be reviewed in light of an access policy. It may be that this practice should be acknowledged in the access policy, indicating that some exhibits may only be available for public access until returned to the parties as provided by court policy and practice.

The definition includes all information used by a court to make its decision, even if an appellate court subsequently rules that the information should not have been considered or was not relevant to the judicial decision made. In order for a court to be held accountable for its decisions all of the information that a court considered and which formed the basis of the court's decision must be accessible to the public.

The language is intended to include within its scope materials that are submitted to the court, but upon which a court did not act because the matter was withdrawn or the case was resolved, for example settled, by the parties. Once relevant material has been submitted to the court, it does not become inaccessible because the court did not, in the end, act on the information in the materials because the parties resolved the issue without a court decision.

Subsection (a)(2): The definition is written to cover any information that relates to a judicial proceeding generated by the court itself, whether through the court administrator's personnel or the clerk's office personnel. This definition applies to proceedings conducted by temporary judges or referees hearing cases in an official capacity. This includes two categories of information. One category includes documents, such as notices, minutes, orders and judgments, which become part of the court record. The second category includes information that is gathered, generated, or kept for the purpose of managing the court's cases. This information may never be in a document; it may only exist as information in a field of a database such as a case management system, an automated register of actions, or an index of cases or parties.

Another set of items included within the definition is the official record of the proceedings, whether it is notes and transcripts generated by a court reporter of what transpired at a hearing, or an audio or video recording (analog or digital) of the proceeding. In some states the court reporter's notes themselves may not be considered part of the record, but the transcript produced from the reporter's notes may be considered part of the record. In other states, the reporter's notes are owned by the court, whereas the transcripts are owned by the reporter. Whether the electronic version of notes produced by a computer assisted transcription system (CAT system), which does not constitute a verbatim transcript, fall within the definitions also needs to be addressed. A state or individual court considering adoption of an access policy should reconcile this section with applicable law regarding reporter's notes and transcripts or electronic recordings of proceedings.

A state or individual court should also address whether an access policy applies to an audio or video tape of a court proceeding other than the official record. If the state has a rule regarding broadcasting audio or video coverage of trial court proceedings, the access policy needs to specifically include or exclude such tapes in the definition of "court record," or specifically limiting access to them in section 4.60.

Subsection (a)(3): The definition of court record includes some information and records maintained by the court and clerk of court that is related to the management and administration of the court or the clerk's office, as opposed to a specific case. In many states these categories of information have traditionally not been considered part of the court record. Examples of this category of information include: internal court policies, memoranda and correspondence, court budget and fiscal records, and other routinely produced administrative records, memos and reports, and meeting minutes. The Commentary to subsection 4.60(b) discusses restriction of access to drafts and work products related to court administration or clerk's office administration.

The Subsection proposes that the state or individual court adopting a policy identify those documents to be included in the definition of a court record which are subject to the policy being adopted. A state may determine that noncase related administrative records should be governed by a different access standard than case related information, and therefore not included within this definition.

Subsection (b)(1): This subsection makes it clear that the *CCJ/COSCA Guidelines* apply only to information related to court judicial proceedings. The types of information described are not court records, nor is the court responsible for their collection, maintenance, or accessibility. If the official who also serves as clerk of court has responsibilities for other information and records, for example land records, which do not relate to specific judicial

proceedings, these *CCJ/COSCA Guidelines* do not apply to these records. The laws and access policies of the agency responsible for gathering and maintaining the information govern access to such information.

Subsection (b)(2): The definition excludes information gathered, maintained or stored by other agencies or entities that is not necessary to, or is not part of the basis of, a court's decision or the judicial process. Access to this information should be governed by the laws and access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information because the computer uses shared software and databases should not, by itself, make the court records access policy applicable to the information. An example of this is information stored in an integrated criminal justice information system where all data is shared by law enforcement, the prosecutor, the court, defense counsel, and probation and corrections departments. The use of a shared system can blur the distinctions between agency records and court records. Under this section, if the information is provided to the court as part of a case or judicial proceeding, the court's access rules then apply, regardless of where the information came from or the access rules of that agency. Conversely, if the information is not made part of the court record, the access policy applicable to the agency collecting the data still applies even if the information is stored in a shared database. In reviewing the applicability of an access policy particular attention should be paid to information about pretrial proceedings, including bail decisions and search warrant requests.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

Some types of information related to the prosecution of a court case are not covered by these *CCJ/COSCA Guidelines*. This includes information exchanged between the parties as part of the litigation, but not delivered to or filed with the court. For example, information exchanged as part of discovery in states where discovery requests and responses are not filed in the court file. If information such as this is exchanged via the court, but not used by the court, the state or individual court should consider adding a provision to this section to address whether this information becomes accessible by virtue of it having been in the court's possession during the exchange.

Another category of such information is that associated with activity in cases that is not occurring within the judicial sphere. An example of this nonjudicial activity would be alternative dispute resolution (ADR) activities, including "private judging," in pending cases that are pursued by the parties with vendors that are independent of the court. Since the information is not delivered to the court, and does not form part of the basis of the court's decision, it does not fall within the definition of this section.

Courts in some states have responsibilities not directly associated with

specific disputes. For example, a court may have some obligation to oversee the management of detention facilities. This section does not address information gathered by or presented to the court in fulfilling these types of obligations. If the courts in a state have such obligations, the access policy should indicate whether the information related to these duties are covered by the policy.

The definition in 3.10(a) includes all information that is given to the court, whether or not it is relevant to the court's judicial decision-making process. The issue implicit here that many courts do not now directly address is the exclusion from the record of legally irrelevant material. The court screens the introduction of materials at hearings and trials and generally relies on attorneys to screen materials submitted for filing. However, many cases these days do not involve an attorney for at least one of the parties, particularly in family law. Clerks generally are instructed not to reject materials offered for filing based on the content of the material. As a result there is nothing to prevent someone from making any information accessible to the public by including it in a document filed with the court. The wide scale public access possible with electronic records increases the risk of harm to an individual from disclosure, suggesting this issue be re-visited. The troubling issue is who decides whether something offered into the court record is relevant, and therefore to be accepted.

Another approach to the problem of the introduction of irrelevant material into the court record is to change, create, or expand the consequences for the introduction, or attempted introduction, of such information. One approach to the issue is to focus on the immunity and liability of people who offer materials into the court record as part of litigation. Currently there is quite broad immunity regarding documents "placed in the record." If immunity was more limited, or there was more explicit liability to third parties harmed by placing information into the court record, the record would be less likely to contain extraneous information that might be harmful to any of the interests stated in section 1.00 of these *CCJ/COSCA Guidelines*. A state or individual court considering the adoption of an access policy should review relevant state law and suggest changes that are designed to ensure that the court record contains only legally relevant information. Defining, creating, or expanding such liability is considered beyond the scope of these *CCJ/COSCA Guidelines*.

**Section 3.20 – Definition Of Public Access**

**"Public access" means that the public may inspect and obtain a copy of the information in a court record.**

*Commentary*

This section defines “public access” very broadly. The unrestricted language implies that access is not conditioned on the reason access is requested or on prior permission being granted by the court. Access is defined to include the ability to obtain a copy of the information, not just inspect it. The section does not address the form of the copy, as there are numerous forms the copy could take, and more will probably become possible as technology continues to evolve.

At a minimum inspection of the court record can be done at the courthouse where the record is maintained. It can also be done in any other manner determined by the court that makes most effective use of court staff, provides quality customer service and is least disruptive to the operations of the court—that is, consistent with the principles and interests specified in section 1.00. The inspection can be of the physical record or an electronic version of the court record. Access may be over the counter, by fax, by regular mail, by e-mail or by courier. The section does not preclude the court from making inspection possible via electronic means at other sites, or remotely. It also permits a court to satisfy the request to inspect by providing a printed report, computer disk, tape or other storage medium containing the information requested from the court record. The issue of the cost, if any, that must be paid before obtaining a copy is addressed in section 6.00.

The section implies an equality of the ability to “inspect and obtain a copy” across the public. Implementing this equality will require the court to address several sources of inequality of access. Some people have physical impairments that prevent them from using the form of access available to most of the public. The Americans with Disabilities Act may require the court or clerk to provide information in a form that is usable to someone with a disability. Another problem has to do with the existence of a ‘digital divide’ regarding access to information in electronic form. The court should provide equivalent access to those who do not have the necessary electronic equipment to obtain access. Finally, there is the issue of the format of electronic information and whether it is equally accessible to all computer platforms and operating systems. The court should make electronic information equally available, regardless of the computer used to access the information (in other words, in a manner that is hardware and software independent).

Another aspect of access is the need to redact restricted information in documents before allowing access to the balance of the document (see section 4.70(a) and associated commentary). In some circumstances this may be a quite costly. Lack of, or insufficient, resources may present the court with an awkward choice of deciding between funding normal operations and funding activities related to access to court records. As technology improves it is becoming easier to develop software that allows redaction of pieces of information in documents in electronic form based on “tags” (such as XML tags) accompanying the information. When software to include such tags in

documents becomes available and court systems acquire the capability to use the tags, redaction will become more feasible, allowing the balance of a document to be accessible with little effort on the part of the court.

**Section 3.30 – Definition Of Remote Access**

**"Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.**

*Commentary*

The objective of defining this term is to describe a means of access that is technology neutral that is used in the *CCJ/COSCA Guidelines* to distinguish means of access for different types of information. The term is used in section 4.20 regarding information that should be remotely accessible. The key elements are that: 1) the access is electronic, 2) the electronic form of the access allows searching of records, as well as viewing and making an electronic copy of the information, 3) a person is not required to visit the courthouse to access the record, and 4) no assistance of court or clerk of court staff is needed to gain access (other than staff maintaining the information technology systems).

This definition provides a term to be used in the policy that is independent of any particular technology or means of access, for example, the Internet or a dial-up system such as the federal court's PACER system.[1] Remote access may be accomplished electronically by any one or more of a number of existing technologies, including dedicated terminal, kiosk, dial-in service, or Internet site. Attaching electronic copies of information to e-mails, and mailing or faxing copies of documents in response to a letter or phone request for information would not constitute remote access under this definition.

**Section 3.40 – Definition Of In Electronic Form**

**Information in a court record "in electronic form" includes information that exists as:**

**(a) electronic representations of text or graphic documents;**

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[1] PACER (Public Access to Court Electronic Records) is the automated case management information system used by the federal courts to provide information about court cases that can be accessed remotely by a subscriber.

**(b) an electronic image, including a video image, of a document, exhibit or other thing;**

**(c) data in the fields or files of an electronic database; or**

**(d) an audio or video recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared.**

*Commentary*

The breadth of this definition makes clear that the *CCJ/COSCA Guidelines* apply to information that is available in any type of electronic form. The point of this section is to define what "in electronic form" means, not to define whether electronic information can be accessed or how it is accessed.

Subsection (a): This subsection refers to electronic versions of textual documents (for example documents produced on a word processor, or stored in some other text format such as PDF format), and pictures, charts, or other graphical representations of information (for example, graphics files, spreadsheet files, etc.).

Subsection (b): A document might be electronically available as an image of a paper document produced by scanning, or another imaging technique (but not filming or microfilming). This document can be viewed on a screen and it appears as a readable document, but it is not searchable without the aid of OCR (optical character recognition) applications that translate the image into a searchable text format. An electronic image may also be one produced of a document or other object through the use of a digital camera, for example in a courtroom as part of an evidence presentation system.

Subsection (c): Courts are increasingly using case management systems, data warehouses or similar tools to maintain data about cases and court activities. The *CCJ/COSCA Guidelines* apply equally to this information even though it is not produced or available in paper format unless a report containing the information is generated. This section, as well as subsection (a), would also cover files created for, and transmitted through, an electronic filing system for court documents.

Subsection (d): Evidence can be in the form of audio or videotapes of testimony or events. In addition audio and video recording (ER - electronic recording) and computer-aided transcription systems (CAT) using court reporters are increasingly being used to capture the verbatim record of court hearings and trials. In the future real-time video streaming of trials or other proceedings is a possibility. Because this information is in electronic form, it would fall within this definition and the *CCJ/COSCA Guidelines* would apply to

it as well. As noted in the commentary to section 3.10(a)(2) there may be laws or rules governing ownership of, and access to, court reporter notes, in paper or in electronic form as captured by a CAT system, or to electronic, audio or digital, recordings of proceedings with which a court's access polices must be consistent, including any fees for copies (see section 6.00).

*Issues Not Addressed in the CCJ/COSCA Guidelines*

The section makes no statement about whether the information in electronic form is the official record, as opposed to, or in addition to, the information in paper form. A state or individual court considering adoption of an access policy might consider whether there is a need to declare which form or are deemed official.

**Section 4.00 – Applicability of Rule**

**These *CCJ/COSCA Guidelines* apply to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.**

*Commentary*

The objective of this section is to make it clear that the *CCJ/COSCA Guidelines* apply to information in the court record regardless of the form in which the information was created or submitted to the court, the means of gathering, storing or presenting the information, or the form in which it is maintained. Section 3.10 defines what is considered to be part of the court record. However, the materials that are contained in the court record come from a variety of sources. The materials are offered and kept in a variety of forms. Information in electronic form exists in a variety of formats and databases and can be accessed by a variety of software programs. To support the general principle of open access, the application of the policy must be independent of technology, format and software and, instead, focus on the information itself.

*Overview of Section 4.00 Provisions*

Three categories of information accessibility are created in the following sections of the *CCJ/COSCA Guidelines*. The first reflects the general principle that information in court records is generally presumed to be accessible (section 4.10). Second, there is a section that indicates what information should be accessible remotely (section 4.20). Following these provisions are sections on bulk release of electronic information (section 4.30) and release of compiled information (section 4.40). A fifth category addresses information that

will be available only at the courthouse, and not remotely (section 4.50). A sixth category identifies information prohibited from public access because of overriding privacy or other interests (section 4.60). Finally, having defined what information is accessible and not accessible, there is a section that indicates how to request the prohibition of access to information generally accessible, and how to gain access to information to which public access is prohibited (section 4.70).

**Section 4.10 – General Access Rule**

**(a) Information in the court record is accessible to the public except as prohibited by section 4.60 or section 4.70(a).**

**(b) There shall be a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication shall not disclose the nature of the information protected.**

*Commentary*

Subsection (a) states the general premise that information in the court record will be publicly accessible unless access is specifically prohibited. There are two exceptions noted. One exception is information in the court record that is specifically excluded from public access by section 4.60. The second exception provides for those individual situations where the court orders a part of the record to be restricted from access pursuant to the procedure set forth in section 4.70(a).

The provision does not require any particular level of access, nor does it require a court to provide access in any particular form, for example, publishing court records in electronic form on a web site or dial-in database. (See section 4.20 on information that a court should make available remotely.)

The provision, by omission, reiterates the concept noted in the commentary to section 2.00 that access is not conditioned on proper use, nor is the burden on requestors to show they are entitled to access.

Subsection (b) provides a way for the public to know that information exists even though public access to the information itself is prohibited. This allows a member of the public to request access to the restricted record under section 4.70(b), which they would not know to do if the existence of the restricted information was not known. Making the existence of restricted information known enhances the accountability of the court. Hiding the existence of information not only reduces accountability, it also erodes public trust and confidence in the judiciary when the existence of the information becomes known.

In addition to disclosing the existence of information that is not available, there is also a value in indicating how much information is being withheld. For many redactions this could be as simple as using "placeholders," such as gray boxes, when characters or numbers are redacted, or indicating how many pages have been excluded if part or all of a document is not accessible. Providing this level of detail about the information contributes to the transparency and credibility of the restriction process and rules.

There are two situations where this policy presents a dilemma. One is where access is restricted to an entire document and the other concerns a case where the entire file is ordered sealed. This section requires the existence of the sealed document or file to be public. The problem arises where the disclosing of the existence of a document or case involving a particular person, as opposed to some of the information in the court record, reveals the very information the restriction order seeks to protect. One example would be the title of a document in a register of actions which describes the type or nature of the information to which access restrictions is being sought. These problems can be avoided, to some extent, by using a more generic description in the caption of a document, or using initials, a pseudonym, or some other unique identifier instead of the parties full or real name.

This section requires disclosure of the existence of sealed information in the interest of a more open judicial record. A state or individual court considering adoption of an access policy may decide to allow a court, using the procedures provided in section 4.70, to decide that even the existence of the information not be made public. This could be readily done by adding an exception clause to the end of this subsection, and specifically allowing the court to restrict access to the existence of information in section 4.70(a).

There may be technical issues in implementing this provision. Some automated case management systems now being used by courts may not have the ability to indicate the existence of information without providing some of the very information that is not to be publicly accessible. For example, it may not be possible to indicate that there is a document to which access is restricted without providing too much information about what type of document it is, or what it is about. Other systems may be designed not to indicate the existence of a document that has been sealed, or the existence of a case that has been sealed. It may be possible in some systems to add codes for a document or case to which access is restricted. While it may be possible to modify these old systems, it may not be cost effective to do so. Rather, the court might have to wait for a new system that includes these capabilities.

The *CCJ/COSCA Guidelines* are drafted for consideration by a state for the state's judiciary, or by an individual court if the state does not adopt a uniform statewide policy. If a state adopts a policy, in the interest of statewide

uniformity the state should consider adding a subsection such as the following to prevent local courts from adopting different policies:

> **(c) A local court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided for in this policy, nor provide greater access than that provided for in this policy**.

This not only promotes consistency and predictability across courts, it also furthers equal access to courts and court records.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

Many states have provisions, generally in criminal cases, where a party can request that a case, record or conviction be made to effectively 'disappear' from the court's records. Examples include expungements, 'adjournment in contemplation of dismissal,' or 'continuance for dismissal' and the 'sealing' or modification of certain types of convictions. Another example is the reduction of a felony conviction to a misdemeanor conviction after successful completion of probation. This type of change to the historical record becomes very problematic if the record being changed was available in electronic form at some point prior to any change. If these types of proceedings are to be retained, the access policy must somehow provide for equivalent protection regarding the electronic and paper records.

The section does not address situations where documents or other parts of the court record are publicly accessible for only a fixed period of time, pursuant to some policy decision embodied in a statute or rule. Examples include: 1) a presentence report in a criminal case that is only publicly accessible for a fixed period of time, after which the report is sealed and not available except by court order, and 2) a criminal case that is sealed pending the defendants successfully completion of a diversion program. A state or individual court adopting an access policy might consider adding a provision that prevents such information from continuing to be publicly available in electronic form when it is no longer available in paper form.

Some states have statutes or rules that provide for short records retention periods for some types of court records, at which time the paper record is to be destroyed. For example, traffic citations are to be destroyed after one year. In order to prevent the electronic record from being out of sync with the paper record, these retention period policies should be reviewed and, possibly revised. If the objective of the short retention policy was simply to eliminate paper in the clerk's office, the court should consider changing the retention policy, at least for electronic versions of the information. If, however, the short retention period also has an objective of clearing people's records of past violations, maintaining an electronic record after the paper record has been destroyed circumvents the policy. If access to the electronic record has

existed while the paper record existed, it is impossible to ensure destruction of all copies of the electronic record that have been obtained by, or delivered to, third parties beyond the court's control. Several approaches are possible. One is to have a policy that the electronic record not be accessible to the public for such records. Alternatively, no electronic version of the record would be made in the first place.

These *CCJ/COSCA Guidelines* are also silent about keeping track of, or logging, who requests to see which court records. Most courts require some form of identification when a physical file is "checked out" from the file room for examination within the courthouse. Most courts do not keep this information once the file is returned. States or individual courts considering some form of logging of user's access need to balance the practical inconvenience, intrusiveness and chilling effect of logging against the potential uses of logs. Maintaining a record of who has accessed information can have a chilling effect on access. Logs of access should also not be used as a basis for denying access. Who has access to such logs also becomes an issue that needs to be addressed. There are good reasons for maintaining logs of requestors, at least for certain types of information. For example, in a case of stalking it would be useful to know who accessed court information that may have aided the stalker in finding the victim. Logging is necessary to keep track of corrections of erroneous information that has been included in the court record, and for collecting fees, for example for a request for a printed copy of information in a court record. If a state or individual court decides to log access requests, they should inform requestors of the logging activity.

**Section 4.20 – Court Records In Electronic Form Presumptively Subject to Remote Access by the Public**

**The following information in court records should be made remotely accessible to the public if it exists in electronic form, unless public access is restricted pursuant to sections 4.50, 4.60 or 4.70(a):**

**(a) Litigant/party indexes to cases filed with the court;**

**(b) Listings of new case filings, including the names of the parties;**

**(c) Register of actions showing what documents have been filed in a case;**

**(d) Calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing;**

**(e) Judgments, orders, or decrees in a case and liens affecting title to real property.**

*Commentary*

Several types of information in court records have traditionally been given wider public distribution than merely making them publicly accessible at the courthouse. Typical examples are listed in this section. Often this information is regularly published in newspapers, particularly legal papers. Many of the first automated case management systems included a capability to make this information available electronically, at least on computer terminals in the courthouse, or through dial-up connections. Similarly, courts have long prepared registers of actions that indicate for each case what documents or other materials have been filed in the case. Again, early case management systems often automated this function. The summary or general nature of the information is such that there is little risk of harm to an individual or unwarranted invasion of privacy or proprietary business interests. This section of the *CCJ/COSCA Guidelines* acknowledges and encourages this public distribution practice by making these records presumptively accessible remotely, particularly if they are in electronic form. When a court begins to make information available remotely, they are encouraged to start with the categories of information identified in this list.

While not every court, or every automated system, is capable of providing this type of access, courts are encouraged to develop the capability to do so. The listing of information that should be made remotely available in no way is intended to imply that other information should not be made remotely available. Some court's automated systems may also make more information available remotely to litigants and their lawyers than is available to the public, but this is outside the scope of this policy (see section 2.00(h)).

Making certain types of information remotely accessible allows the court to make cost effective use of public resources provided for its operation. If the information is not available, someone requesting the information will have to call the court or come down to the courthouse and request the information. Public resources will be consumed with court staff locating case files containing the record or information, providing it to the requestor, and returning the case file to the shelf. If the requestor can obtain the information remotely, without involvement of court staff, there will be less use of court resources.

In implementing this section a court should be mindful about what specific pieces of information are appropriately remotely accessible. Care should be taken that the release of information is consistent with all provisions of the access policy, especially regarding personal identification information. For example, the information remotely accessible should not include information presumptively excluded from public access pursuant to section 4.60, prohibited from public access by court order pursuant to 4.70(a), or not

available remotely pursuant to 4.50. An example of calendar information that may not by accessible by law is that relating to juvenile cases, adoptions, and mental health cases (see commentary associated with section 4.60(b)).

Subsection (e): One role of the judiciary, in resolving disputes, is to state the respective rights, obligations and interests of the parties to the dispute. This declaration of rights, obligations and interests usually is in the form of a judgment or other type of final order. Judgments or final orders have often had greater public accessibility by a statutory requirement that they be recorded in a "judgment roll" or some similar practice. One reason this is done is to simplify public access by placing all such information in one place, rather than making someone step through numerous individual case files to find them. Recognizing such practices, the policy specifically encourages this information to be remotely accessible if in electronic form.

There are circumstances where information about charges and convictions in criminal cases can change over time, which could mean copies of such listings derived from court records can become inaccurate unless updated. For example, a defendant may be charged with a felony, but the charge may be dismissed, or modified or reduced to a misdemeanor when the case is concluded. In other circumstances a felony conviction may be reduced to a misdemeanor conviction if the defendant successfully completes probation. These types of circumstances suggests that there be a disclaimer associated with such information, and that education about these possibilities be provided to litigants and the public.

**Section 4.30 – Requests for Bulk Distribution of Court Records**

**Bulk distribution is defined as the distribution of all, or a significant subset, of the information in court records, as is and without modification or compilation.**

**(a) Bulk distribution of information in the court record is permitted for court records that are publicly accessible under section 4.10.**

**(b) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the release of information pursuant to this subsection the requestor must comply with the provisions of section 4.40(c).**

*Commentary*

This section addresses requests for large volumes of information in court

records, as opposed to requesting information from a particular case or reformulated information from several cases (see section 4.40). The section authorizes bulk distribution for information that is publicly accessible. It also sets out a method of requesting bulk distribution of information to which public access is restricted.

There are advantages to allowing bulk access to court records. Allowing the public to obtain information from court records from a third party may reduce the number of requests to the court for the records. Fewer requests mean less court staff resources devoted to answering inquiries and requests.

However, there are costs associated with making the records available. There may also be technology, as well as cost, issues in providing bulk distribution of information. For example, a court's systems may not be able to identify and separate publicly accessible information from restricted information in creating a copy of information for bulk distribution. Permitting bulk distribution of information in this circumstance assumes providing the data will not interfere with the normal operations of the court. There is also the 'cost' of reduced public confidence in the judiciary from the existence of inaccurate, stale or incorrectly linked information available through third parties but derived from court records.

In allowing bulk data to be disseminated a court should be mindful not to gather information that it does not need to fulfill its judicial role, even if those requesting bulk information are interested in obtaining this information.

Subsection (a). Bulk transfer is allowed for information that is publicly accessible under these *CCJ/COSCA Guidelines*. There is no constitutional or other basis for providing greater access to bulk requestors than to the public generally, and this section implies there should be no less access.

Consistent with section 3.20, public access, including bulk access, is not dependent upon the reason the access is sought or the proposed use of the data. Court information provided through bulk distribution can be combined with information from other sources. Information from court records may be linked with other information and may be used for purposes that are unrelated to why the information was provided to the court in the first place.

Many states that have considered the bulk data issue for information in electronic form have adopted access policies that only allow case-by-case access, one case at a time, and no bulk distribution, even of otherwise publicly accessible information. However, existing technology and software, using repeated queries and "screen scraping," can accomplish bulk distribution from 'one-case-at-a-time' systems fairly rapidly. The *CCJ/COSCA Guidelines*, therefore, explicitly provides for bulk distribution in recognition of this potential.

It is significant to note that transferring information in the court record into databases that are then beyond the court's control creates the very real likelihood that the information will, over time, become incomplete, inaccurate, stale or contain information that has been removed from the court's records. Keeping information distributed in bulk current may require the court to provide "refreshed" information on a frequent, regular and periodic basis. This may raise issues of availability of court resources to do this. Although creating liability or penalties on the third party information provider (something beyond the scope of these *CCJ/COSCA Guidelines*) might reduce the risk of stale or incorrect information being distributed, meeting this standard still requires the court to provide updated and new information on a frequent basis.

A particular problem with bulk distribution of criminal conviction information has to do with expungement policies. If the intent of an expungement policy is to "erase" a conviction, the public policy may be impossible to implement if the information is already in another database as a result of a bulk transfer of the information. An approach needs to be devised that accommodates expungement and bulk distribution.

Potential mass access to electronic court information further highlights the question of the accuracy of the court's records. This is particularly important for databases created by court or clerk of court employees. The potential for bulk distribution of the information in a court database will require courts and clerks to be even more vigilant about both the accuracy of their databases and the timeliness of entering information into them. Policies relating to the internal practices of the court and clerk regarding data entry quality and accuracy are beyond the scope of this access policy.

A counter-intuitive aspect of bulk data release has to do with the linking of the information from court records with information from other sources. In order to correctly link court information with information from other sources, the information vendor must have pieces of information that allow accurate matching of court information about someone or an entity with information from other sources. This type of personal identifier information is often the most sensitive in terms of privacy. If a court were interested in minimizing the risk of bulk data it provides being incorrectly linked to information from other sources, it might provide more personal identifier information, not less, in those situations where linking is contemplated. However, courts should not be gathering information it does not need for judicial purposes. Generally, court records do not contain key linking information, for example birth dates or social security numbers, for individuals.

As noted many states that have considered the bulk data issue have adopted access policies that only allow access to one case at a time, and no bulk data access. This reduces the likelihood of "stale" information existing in

databases because a query directed to the court's database, one at a time, will be searching more current court data than a query to a database consisting of a bulk download of court information that may not be current, depending upon when the data was transferred or last updated. Not providing bulk distribution also eliminates the need to establish mechanisms to provide frequent and regular updates. If a state or individual court adopts a bulk access policy more restrictive than that in these *CCJ/COSCA Guidelines*, it might consider different bulk access rules for different types of information. For example, bulk access might be allowed for indexes, but not for the contents of the case management system or for electronic versions or images of documents filed in cases.

Subsection (b). Subsection (b) provides a process for obtaining bulk data for information not publicly accessible. One reason court records are publicly accessible is to allow the public to monitor the performance of the judiciary. One method of monitoring performance is to examine the information in a set of cases to see whether the court's decisions across cases are consistent, predictable, fair and just. This sort of examination requires access to all information considered by the court in making its decision, as it is difficult to say ahead of time that any piece or category of information is not relevant and therefore should not be made available. This section states that the request for bulk access should be made to the court, i.e., allowing bulk access is a judiciary decision. A state or individual court that adopts an access policy should provide more detail about where and to whom a request should be delivered, who makes the decision on the request, and what the legal standard is for granting or denying the request.

Subsection (b) includes the term "journalistic." This term is not defined in these *CCJ/COSCA Guidelines*. A state or individual court adopting an access rule should consider addressing this issue. Given the ease of "publishing" information on the Internet, the term may have broad application. However, any concern may be diminished by the reference to section 4.40(c) regarding use of the information, and protections provided for individual identifying information.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

One issue not addressed in this section is what can be done to keep the information released in bulk in sync with the information in the court's record. One option would be to make the requestor receiving information by bulk distribution responsible for the currency and accuracy of any information before making it accessible to clients or the public. Alternatively, the information provider could be required to inform the clients or public of the limitations of the data. Another option would be for courts to refuse to continue supplying bulk data to a certain organization, or on a certain subject, if abuses occur regarding maintenance of accuracy or currency.

Conversely, the court could 'certify' entities or individuals to receive bulk data based on compliance with certain practices that improved the accuracy and currency of the information they receive and the accuracy of linking the information with information from other sources. Certification might be limited to entities subject to regulation, for instance under the Fair Credit Reporting Act[2], at
the federal or state level.

The *CCJ/COSCA Guidelines* do not address the need for, or extent of, regulation of those obtaining bulk data who, in turn, provide information from court records to others. There are federal laws[3] regulating some information providers, and states may have some laws. Another approach to preventing misuse of information in court records would be through regulation of information providers who are given information from court records.

An alternative approach would be to strengthen or establish liability on the part of the information provider for errors or omissions in the information, or for disseminating information that is no longer publicly available from the court. Having obtained the information from the government would not be a defense. However, analyzing and proposing language for this sort of liability is beyond the scope of these *CCJ/COSCA Guidelines*.

Another concern with release of bulk data is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information start to become available, it generally is only in complex cases or a certain class of cases. Bulk data consisting of only electronic records may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If scanning or other conversion into electronic form is not done for historical records, then the electronic record may only be the recent cases or only the newer information in older cases, depending upon how a court implements the conversion of records to electronic form.

Another consideration related to the nature of bulk release is that a "dump" of the information in electronic form creates a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.

**Section 4.40 – Access to Compiled Information From Court Records**

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[2] Fair Credit Reporting Act, 15 USC §§ 1681 et seq.

[3] For example the Fair Credit Reporting Act, 15 USC §§ 1681 et seq.

**(a) Compiled information is defined as information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record.**

**(b) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already available pursuant to section 4.20 or in an existing report. The court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the court, that the resources are available to compile the information and that it is an appropriate use of public resources. The court may delegate to its staff or the clerk of court the authority to make the initial determination as to whether to provide compiled information.**

**(c) (1) Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.**

**(2) The request shall:**

**(i) identify what information is sought,**

**(ii) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and**

**(iii) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.**

**(3) The court may grant the request and compile the information if it determines that doing so meets criteria established by the court and is consistent with the purposes of the access policy, the resources are available to compile the information, and that it is an appropriate use of public resources.**

**(4) If the request is granted, the court may require the requestor to sign a declaration that:**

**(i) The data will not be sold or otherwise distributed, directly or indirectly, to third parties, except for journalistic purposes,**

**(ii) The information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes, and**

**(iii) There will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.**

**The court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited.**

*Commentary*

This section authorizes access to compiled information. The section describes how the compiled information is requested, the requirements for obtaining compiled information, and possible limitations on using the information.

The primary interests served by release of compiled information are supporting the role of the judiciary, promoting the accountability of the judiciary, and providing public education regarding the judiciary. Compiled data allows analysis and comparison of court decisions across cases, across judges and across courts. This information can also educate the public about the judicial process. It can provide guidance to individuals in the conduct of their everyday life and business. Although some judges may have legitimate concerns about misuse of compiled data, for example in comparing the decisions of judges, such an analysis is one approach to monitoring the performance of the judiciary.

Compiled data also allows the study of the effectiveness of the judiciary and the laws enforced in courts. For example, the studies of delay reduction leading to improved case management and faster case processing times were based on analysis of compiled data from thousands of cases in over a hundred courts across the country.

In allowing compiled data to be disseminated a court should be mindful not to gather information that it does not need to fulfill its judicial role, even if those requesting compiled information are interested in obtaining this information.

Subsection (a) provides a definition of compiled information. Compiled information is different from case-by-case access because it involves information from more than one case. Compiled information is different from bulk access in that it involves only some of the information from some cases and the information has been reformulated or aggregated; it is not just a copy of all the information in the court's records. Essentially compiled information involves the creation of a new court record. In order to provide compiled information a court generally must write a computer program to select the

specific cases or information sought in the request, or otherwise use court resources to identify, gather, and copy the information.

Generating compiled data may require court resources and generating the compiled information may compete with the normal operations of the court for resources, which may be a reason for the court not to compile the information. It may be less costly for the court and less of an impact on the court to, instead, provide bulk distribution of the requested information pursuant to section 4.30, and let the requestor, rather than the court, compile the information.

Subsection (b) addresses requests for information that is publicly available. Since public resources are used in responding to the request, the question for the court is whether responding meets criteria established by the court for providing such information, whether the expenditure of public resources is appropriate, and whether the court will choose to expend available resources on the request. Before adapting such a policy, a state or individual court should identify what criteria and legal standard a requestor must meet before compiled information will be provided. A fee, if any, for providing the compiled information would be covered by section 6.00.

The reference in section 4.40(b) to section 4.20 and existing reports is intended to limit the section's application to requests for compiled data that are not already routinely prepared and made public. Party name indices, or a screen that reports the results of a name search of either civil or criminal cases, are examples of compiled information that already exist.

Section 4.40(c) addresses requests for information that is not publicly accessible. Since the information is not publicly accessible, the subsection is concerned about the purpose for requesting the information (subdivision (1)) and the court must consider more factors than whether resources are available and appropriately spent on compiling the information (subdivisions (2) and (3)). If the request is granted, subdivision (4) provides for protections of the restricted information.

Section 4.40(c) includes the term "journalistic." This term is not defined in the *CCJ/COSCA Guidelines*. A state or individual court adopting an access rule should consider addressing this issue. Given the ease of "publishing" information on the Internet, the term may have broad application. However, any concern may be diminished by the balance of the subdivision provisions regarding use of the information and protections provided for personal identifier information.

The exception for "journalistic purposes" in subdivisions 4.40(c)(4) is included as a recognition that what journalism sells is information, and

prohibiting a journalist from selling the information may defeat the purpose of providing the information to the journalist in the first place.

Subdivision 4.40(c)(4) identifies provisions for preventing improper disclosure of restricted or prohibited information. A state or individual court's policy might also consider a requirement of a nondisclosure agreement that includes injunctive relief and indemnities for improper disclosure. In order to get a court order releasing the information the appropriate nondisclosure agreement must be signed by the requestor. A state or individual court should also review what penalties, if any, are available for unauthorized disclosure, including contempt, under existing law. Note that there may be federal restrictions on release of personal information applicable to an entity requesting the data (see discussion in Commentary regarding "Research Involving Human Subjects" in 4.60(a).

One concern with the distribution of compiled data is the interpretation of the data. Analysis of the data without a full understanding of the meaning of the data elements or codes used, or without a full understanding the limitations of the data, can result in conclusions not substantiated by the data. To some extent this can be addressed by explanatory information provided with the transmittal of the compiled information. There are two issues here. One is the courts may not be asked to help recipients of compiled data understand and verify the data. The other issue is enforcement of restrictions on the use or dissemination of information provided. One option is for courts to refuse to continue supplying compiled data to a certain organization, or on a certain subject, if abuses occur. Another option is to create, or strengthen, penalties for the release of information to which access is restricted under these *CCJ/COSCA Guidelines*.

Another concern with release of compiled data in electronic form is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information became more available, it is generally only in complex cases or a certain class of cases. Compiled data from the electronic record may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If historical records are not scanned or otherwise converted into electronic form, the electronic records will only be recent cases or newer information in older cases. There are no obvious ways to avoid this problem, assuming the cost of producing electronic versions of all existing records is prohibitive.

Another consideration in the release of compiled information is that the extracted set of information is a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.

**Section 4.50 – Court Records That Are Only Publicly Accessible At A Court Facility**

**(a) The following information in a court record will be publicly accessible only at a court facility in the jurisdiction, unless access is prohibited pursuant to section 4.60 or 4.70(a).**

> **[Include a list of information available only at a court facility here.]**

**(b) A request to limit public access to information in a court record to a court facility in the jurisdiction may be made by any party to a case, an individual identified in the court record, or on the court's own motion. For good cause the court will limit the manner of public access. In limiting the manner of access the court will use the least restrictive means that achieves the purposes of the access policy and the needs of the requestor.**

*Commentary*

This section defines another category of access to information. Section 4.10 states the basic presumption that records are publicly accessible. Section 4.60 identifies limited sets of information to which public access is prohibited. The objective of this section is to suggest that some information in the court record be available only at a court facility, not remotely. The access at the court facility may be electronic, through a terminal or kiosk connected to the court's database, or to the physical case file itself or a printout of information that exists only in electronic form. The limitation is to the manner of access, not whether there is access. It is anticipated that the categories of information to which access will be limited in this manner are not extensive. Some representatives of the media on the Advisory Committee were opposed to any type of tiered access approach, such as that outlined in this section.

The limitation of manner of access is one way of reducing the risk of negative impacts from public accessibility, such as injury to an individual, while maintaining traditional public access at the courthouse. There are alternatives means of achieving these protections. One alternative is to allow remote electronic access only through a subscription service (discussed further below). Another alternative adopted by several states is to limit remote, electronic access to one case at a time. All information remains available at the courthouse, but it can be accessed through the electronic case management system only by a requestor specifying which case they want to see, that is, access is on a case-by-case basis.

Section 4.50(a). If a court is considering making information in court

records available electronically and remotely, for example on-line through a web site, they should consider whether some categories of information might, instead, only be accessible at a court facility within the jurisdiction. The following categories of information have been identified by the Advisory Committee or by commentors as candidates for being available only at a court facility. Often there was considerable disagreement among the Committee members about whether categories should be on the list, or whether limiting language should be added to some of the categories. Rather than including categories of items on a list as is contemplated by this section, several members of the Advisory Committee thought limitations on access to the items should, instead, only be considered on a case-by-case basis, to limit access under a provision like 4.50(b) or to prohibit access under section 4.70(a).

- Addresses, phone numbers and other contact information for victims (not including defendants) in domestic violence, stalking, sexual assault, and civil protection order proceedings;

- Addresses, phone numbers and other contact information for victims in criminal cases;

- Addresses, phone numbers and other contact information for witnesses (other than law enforcement witnesses) in criminal, domestic violence, sexual assault, stalking, and civil protection order cases;

- Social security numbers;

- Account numbers of specific assets, liabilities, accounts, credit cards, and PINs (Personal Identification Numbers);

- Photographs of involuntary nudity;

- Photographs of victims and witnesses involved in certain kinds of actions;

- Obscene photographs and other materials;

- Medical records;

- Family law proceedings including dissolution, child support, custody, visitation, adoption, domestic violence, and paternity, except final judgments and orders;

- Termination of parental rights proceedings;

- Abuse and neglect proceedings where access is not prohibited under section 4.60; and

• Names of minor children in certain types of actions.

All publicly accessible information would continue to be available at the courthouse. The phrase "at a court facility in the jurisdiction" is used in recognition that some jurisdictions have more than one courthouse and access could be at any courthouse within the jurisdiction. Restricting access to a court facility in a jurisdiction is problematic where the database is a statewide database used by all courts, or the database and software are shared over a statewide intranet. A state adopting an access policy may need to accommodate this section to the database system in use in the state. A state may also decide not to limit the access to the courthouse within a jurisdiction, but allow access at any courthouse in the state.

The cross-reference to sections 4.60 and 4.70(a) makes it clear that this section does not imply that information to which access is prohibited pursuant to 4.60 or 4.70(a) would be publicly accessible at a court facility.

The approach proposed may be difficult to implement. To the extent it requires the court or clerk of court staff to look at each piece of information to decide whether it can be available remotely, it imposes added burdens on staff. "Reading" a document to determine whether it contains information on the list is unrealistic, suggesting sometimes access to documents will be limited because they contain such information, rather than attempting to redact the information. The burden is reduced to the extent the categories are straightforward in application, or if the parties indicate to the court that certain information fits into one of the categories. For example, the parties could be asked to complete a form with each filing indicating whether any information in the submission fits into one of the categories of this section. Advances in technology, for example using XML tagging, would greatly facilitate the implementation of this rule.

Another aspect of this approach is the inconvenience to some individuals who regularly access court records. For example, attorneys would be required to go to the courthouse to get this type of information even if it is in a neighboring jurisdiction, or across the state. While allowing electronic access would be more convenient, the convenience increases the risk of harm this section attempts to minimize.

It should be noted that this section would not prevent the information from being available in an electronic database operated by someone other than the court. If the information is publicly available in the courthouse, there is nothing to stop someone from coming to the courthouse, making notes of the information and entering it into an electronic database available remotely to anyone with access to the private database.

A policy that requires someone to physically go to the courthouse to obtain information is arguably creating unequal access, as compared to information that is remotely accessible. A counter-argument would be that there is no change to current access for the information, only expanded access for some types of information.

*Alternative Approach – Remote Access by Subscription*: An alternative to limiting access to the court facility for some categories of information is to allow remote electronic access to any publicly available information only to those who subscribe to such access. The subscription service would be available to any person or entity who signs up for the service by agreeing to abide by the conditions of the service agreement, and, possibly, paying a subscription fee. A password would be required for a subscriber to obtain access, allowing a level of accountability for access, and permitting some controls in the event of abuse. The only information that could be remotely available without a subscription would be that provided for in section 4.20. With the subscription service there could be no identification or segregation of information in court records that ought not to be remotely available; everything not restricted by 4.60 or 4.70(a) could be available remotely to subscribers.

As technology advances, increasing the courts' ability to screen information in documents, or when a court determines that there is little risk of injury from posting certain categories of documents, then these categories of information could move from access only through the subscription service to broader remote public access under 4.20.

This alternative would provide greater protection of privacy rights and interest only to the extent the requirement of becoming a subscriber deters access. At the same time it would more conveniently make available information to regular users such as lawyers (for cases in which they are not attorney of record), credit bureaus, the media, etc. There can be no absolute guarantee that by requiring a person to become a subscriber the person won't be able to acquire court information that allows them to do harm.

There are two possible approaches regarding limitations on potential subscribers. One approach, consistent with the intent of sections 2.00 and 4.00, would be that signing up for subscription access could not be limited based on who was seeking access or the reason they wanted access. Rather, the expectation is that simply requiring identification, a fee, and agreement of compliance with certain conditions will forestall or minimize access that might lead to misuse of information or injury to individuals. This approach would not eliminate the possibility of misuse or injury, nor is it likely to be as effective in reducing the risk of misuse or injury as the restrictions to access contemplated by section 4.50, which focus on the specific pieces of information, like victim contact information, that are sought by those intending injury.

The other approach would involve some restrictions on becoming a subscriber. The ability to impose limitations could be based on the fact that access to records at a court facility would not change, so there is no reduction in historical levels of public access. Limitations on who could subscribe could be based on who the subscriber is, what they propose to do with the information, or could impose conditions on use of information obtained from court records. While it is always possible for someone to misrepresent who they are, or their intent, the requirements would reduce, but certainly not avoid, misuse of information, and the risk of use of information to cause injury. There is also the problem of a valid subscriber establishing a search engine accessible to others who are not subscribers, thus thwarting the possible protections. As with the first approach, the protection comes from limiting who has access, not limiting access to the specific types of information that can be used to inflict injury.

*Alternative Approach – Experimenting With Remote Access*: Another approach would be to authorize one or a few jurisdictions in a state to make court records remotely accessible and to monitor the access and use. The intent of the monitoring would be to identify the extent of use of access and benefits and to see what adverse impacts arise and what might be done to avoid or minimize them. The federal courts are engaging in such an experiment regarding information in criminal cases.[4] The monitoring would be most useful if it involved logging of access to court records during the experiment. Logging would allow tracing to establish specific causal relationships if some injury occurred using information in a court record. It would also allow actual users of remote access to be surveyed to find out what information they sought and why, not for purposes of prior restraint, but to identify the real uses and benefits of making information in court records remotely available.

One risk of this approach is someone obtaining information from a court record remotely and using the information to inflict injury on, or even kill, someone. The most obvious risk is to victims, especially in domestic violence, sexual assault, or stalking cases, or witnesses in cases. This risk could be minimized by not making contact information for these categories of people available remotely, which is the objective of section 4.50. Note that judicial immunity may not cover the decision to make publicly available information that leads to harm being done.

Section (b) provides a procedure whereby a person can request a court to limit the manner of access for certain information about them by ordering that it be available only at a court facility. This subsection is similar to the process set forth in 4.70(a) allowing a person to request that public access to certain information be prohibited. However, the option of only restricting remote access is a less restrictive approach, since the information would still be available at a

[4] See http://www.privacy.uscourts.gov/b4amend.htm.

court facility.

The standard included in subsection (b) for limiting remote access is "good cause". A state or individual court considering adoption of an access policy should determine whether this is an appropriate standard, or whether a higher standard is more appropriate. Since access at the courthouse is not being restricted or prohibited, it may not be necessary to use a higher standard required where public access is being prohibited altogether.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

The section does not address what access is permitted between the time a request to restrict access is made and the court rules on the request. This is particularly critical if the request is made simultaneously with the filing of the information. It is also more critical where the parties represent themselves and are unaware of appropriate procedures. A state or individual court considering adoption of an access policy might consider adding a provision that access will be restricted to the extent requested during the time a request is pending before the court. In order to avoid the use of such a provision to achieve at least temporary restriction a court should establish procedures that provide for prompt consideration of a request to restrict access. Alternatively a court could require that a party file a motion to restrict access with the information to be protected in a sealed envelope being lodged, but not filed, with the court. If the court grants the request, the information can be filed with restrictions to access. If the request is denied, the party has the option of filing the information without restriction, or not filing it.

The section does also not address possible remedies for violating restrictions on access.

A state or individual court adopting an access policy might also consider limiting remote access to other categories of court records where doing so furthers the purposes of their policy. The court might differentiate access to information based on the veracity of the information. For example, the court could limit remote access to unsworn allegations, while allowing remote access to sworn declarations and pleadings. The differentiation would be based on the categorization of the document, not the contents of the document; in the example above unsworn documents versus sworn documents.

**Section 4.60 – Court Records Excluded From Public Access**

**The following information in a court record is not accessible to the public:**

**(a) Information that is not to be accessible to the public pursuant to federal law;**

**(b) Information that is not to be accessible to the public pursuant to state law, court rule or case law as follows:**

**[List those categories or types of information to which public access is to be restricted]**

**A member of the public may request the court to allow access to information excluded under this provision as provided for in section 4.70(b).**

*Commentary*

The objective of this section is to identify those categories of information to which public access will be prohibited. The concept of the section is that for certain types of information an existing statute, rule or case law expresses a policy determination, made by the Legislature or the judiciary, that the presumption of public access has been overcome by a sufficient reason, and that the prohibition of public access applies on a categorical, as opposed to a caseby-case, basis. The *CCJ/COSCA Guidelines* contemplate that a state or individual court considering adoption of an access policy would examine its statutes, rules and case law and identify categories of information, if any, to which public access has been prohibited. The state or individual court might also consider the subjects described in the commentary below as possible additional items for the list. Those categories meeting the appropriate constitutional or other legal standard should be specified in this section of the *CCJ/COSCA Guidelines*.

The last paragraph of the section simply provides a cross-reference to the section that describes the process and standard for requesting access to information to which access is prohibited pursuant to this section.

The section suggests two sources of restrictions on access to information. The first is federal law, although there are few, if any, such limitations. The second source is those categories, if any, identified at the state level. The following commentary provides several lists of categories that currently exist in one or more states or have been suggested through the public comment process associated with the development of these *CCJ/COSCA Guidelines*.

Subsection (a) Federal Law: There are several types of information that are commonly, if incorrectly, considered to be protected from public disclosure by federal law. Although the laws or regulations may prohibit a federal agency, federal employees, or certain other specifically designated parties from disclosing certain information, the prohibition generally does not extend to disclosure by state courts where the information becomes part of the court

record.[5] It may be that the federal laws or regulations apply to individuals who introduce restricted information onto the court records, perhaps requiring the individuals to request the court to restrict access under sections 4.50 or 4.70(a). Each category is discussed below.

*Social Security Numbers*. Although there may be restrictions on federal agencies disclosing Social Security Numbers (SSNs), they do not apply to state or local agencies such as courts.[6] One provision of the Social Security Act[7] does bar disclosure by state and local governments of SSNs collected pursuant to any law enacted on or after October 1, 1990. Assuming the section is applicable to state courts (there is some question about this), it would only apply to laws authorizing courts to collect SSNs that were adopted after this date. One possible example of this may be the law passed in the mid 1990s to facilitate child support collection[8] that requires inclusion of SSNs in orders granting dissolution of marriage, establishing child support or determining paternity. There does not appear to be any consensus as to whether the non-disclosure provision applies to, or is superseded by, the newer collection requirement.

*Federal income or business tax returns*. Federal law prohibits disclosure of tax returns by federal agencies or employees, but the prohibition does not extend to disclosure by others.

*Educational information protected by federal law*. A federal law protects information about students receiving federal aid from disclosure by a university or public school system, but it does not address disclosure of such information in a court record.[9]

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[5] Section 7 of the Privacy Act of 1974 (5 USC § 552a) provides that an individual cannot be refused any right, benefit, or privilege because of a refusal to disclose a SSN, and that any agency that requests a SSN shall inform the individual whether or not the disclosure is mandatory, and the authority for requesting the SSN. However, neither provisions addresses disclosure of the SSN to the public.

[6] See "Social Security Numbers; Government Benefits from SSN Use but Could Provide Better Safeguards," United States General Accounting Office, GAO-02-352, May 2002, pp. 57-58. Note there is federal legislation pending in 2002 (S. 848 - Feinstein) that would prohibit the display of SSNs to the public.

[7] 42 USC § 405(c)(2)(C)(viii)(I), which provides: "Social security account numbers and related records that are obtained or maintained by an authorized person pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security number."

[8] 42 USC § 405(c)(2)(C)(ii).

[9] 20 USC § 1232g.

*Health and medical information*. The Health Insurance Portability and Accountability Act of 1996[10] (HIPAA) and regulations adopted pursuant to it[11] limit disclosure of certain health related information about people by certain health-care entities. Whether the limitation extends to state court records is not clear. There are also federal restrictions regarding information in alcohol and drug abuse patient records[12] and requiring confidentiality of information acquired by drug court programs.[13]

*Criminal History Information*. There are federal regulations and state laws generally restricting the use of criminal history information contained in criminal records repositories maintained by executive branch agencies, particularly nonconviction information, to criminal justice purposes.[14] The provisions do not extend to information once it becomes part of a court record in a case; nor do they extend to court records containing criminal conviction information.

*Research Involving Human Subjects*. There are federal regulations establishing practices and, in certain circumstances, prohibiting disclosure of certain personal identifier information gathered in the course of federally funded research on human subjects.[15] This does not apply to information gathered by a state court in the normal course of judicial business,[16] but it might apply to individuals requesting information from court records for research purposes under section 4.30 (bulk access) or section 4.40 (compiled access).

Subsection (b) – State statutes, rules and case law: Most states already have statues or rules identifying certain types of information to which public access is restricted. There may also be case law upholding restrictions to

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[10] Public Law No. 104-191, sections 261-264

[11] "Standards for Privacy of Individually Identifiable Health Information," 45 CFR Part 160 and 164. The regulations became effective April 14, 2001, but compliance is not required until April 14, 2003.

[12] 42 CFR, Part 2 – Confidentiality of Alcohol and Drug Abuse Patient Records.

[13] 42 USC § 290dd-2. See "Federal Confidentiality Laws and How They Affect Drug Court Practitioners," National Drug Court Institute, April 1999.

[14] See "Report of the National Task Force on Privacy, Technology, and Criminal Justice Information," Bureau of Justice Statistics, NCJ-187669, August 2001.

[15] 28 CFR, Part 46 and 45 CFR section 46.

[16] 28 CFR § 46.101(b)(4).

access to a category of information. As noted above, a state or individual court adopting an access policy should review existing state law (statutes, court rules and case law) and identify information to which access is now restricted, and determine whether to include the category of information in this section of an access policy, or seek to change the law restricting access to the category of information.

Information that may not be accessible to the public pursuant to state law, whether in a statute or rule of court, generally falls into two categories. First are case types where the entire court record is generally not publicly accessible. Examples include:

Juvenile dependency (abuse and neglect) proceedings;

Termination of parental rights and relinquishment proceedings;

Adoption proceedings;

Guardianship proceedings;

Conservatorship proceedings;

Mental Health proceedings;

Sterilization proceedings; and

Petitions for waiver of parental consent for minor abortion.

Second are documents, parts of the court record, or pieces of information (as opposed to the whole case file) for which there may be a sufficient interest to prohibit public access. Examples include:

Name, address, telephone number, e-mail, or places of employment of a victim, particularly in a sexual assault case, stalking or domestic violence case;

Name, address or telephone number of witnesses (other than law enforcement personnel) in criminal or domestic violence protective order cases;

Name, address or telephone number of informants in criminal cases;

Names, addresses or telephone numbers of potential or sworn jurors in a criminal case;

Juror questionnaire information;

Wills deposited with the court for safekeeping;

Medical or mental health records, including examination, diagnosis, evaluation, or treatment records;

Psychological evaluations of a party, for example regarding competency to stand trial;

Child custody evaluations in family law or juvenile dependency (abuse and neglect) actions;

Description or analysis of a person's DNA or genetic material, or biometric identifiers;

Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, or Personal Identification Numbers (PINs) of individuals or business entities. (See further comments below);

State income or business tax returns;

Proprietary business information such as trade secrets, customer lists, etc. (See further comments below.);

Grand Jury proceedings (at least until the indictment is presented and the defendant is arrested);

Presentence investigation reports;

Search warrants and affidavits (at least prior to the return on the warrant);

Arrest warrants and affidavits (at least prior to the arrest of the person named);

Applications and supporting documents that contain financial information filed as part of a request to waive court fees or to obtain appointment of counsel at public expense;

Applications for accommodations under the Americans with Disabilities Act;

Proceedings to determine the mental competency of a defendant in a criminal case or juvenile in a delinquency case;

Judicial work product (see further comments below);

Court administration and clerk of court work product (see further comments below);

Certain court administration records (see further comments below);

Proprietary interests of the government (see further comments below);

and

Personnel records of public employees.

Additional categories of information to which a state or individual court might also consider restricting general public access include:

Names and address of children in a juvenile dependency proceeding;

Names and addresses of children in a dissolution, guardianship, domestic violence, sexual assault, harassment, or protective order proceeding;

Addresses and phone numbers of litigants in cases;

Photographs depicting violence, death, or children subjected to abuse;

Certain exhibits in trials such as photographs depicting violence, death, children subjected to abuse or depictions of medical information;

Information gathered or created during the investigatory phase that is related to the performance, misconduct or discipline of a lawyer (where the judiciary has authority over lawyer admittance and discipline and there are not other provisions covering access to this information);

Information gathered or created during the investigatory phase that is related to the performance, misconduct or discipline of a judicial officer (where the judiciary has authority over judicial officer discipline and there are not other provisions covering access to this information); and Information gathered or created during the investigatory phase that is related to alleged misconduct by entities or individuals licensed or regulated by the judiciary.

The categories of restricted information vary considerably across states. The list provided above is meant to be exemplary, and not exhaustive or definitive. There was a wide range of opinion among Advisory Committee members about what might be included on such a list.

*Financial Information*: While information about the existence and amount of an asset or liability may be relevant to a court decision and therefore publicly accessible, there is no general need to disclose the particular account numbers or means and codes for accessing the accounts. In those instances where the account numbers, or other information included within the definition of this subsection, may be relevant or otherwise possibly subject to public access, access can be requested under section 4.70(b).

Restricting information in this area is probably the most difficult to implement. Existing court records already contain large amounts of detailed financial information, particularly in family law and probate proceedings. Court forms often require this information, although it is not clear that the court always needs the details to make its decisions. Many parties, particularly those without legal representation, are not aware that this information may be accessible to the general public. There is also the problem of a party intentionally including this type of information in a document filed with the court, effectively misusing the court process. A state or individual court considering adoption of an access policy should review its forms and the information parties are required to provide to minimize the gathering of information to which public access ought not generally be provided. Alternatively the parties could be required to exchange the detailed information, but the forms filed in the court record would only contain summary information.

*Proprietary Business Information*: This is intended to protect proprietary business information on a categorical basis. When a state adopts a rule based on these *CCJ/COSCA Guidelines*, it should consider a cross-reference to the statutes that define proprietary information, or reference the standard in case law, so that the access policy is consistent with other law in the state about restricting access to this type of information. An alternative approach would be to leave this sort of information to individual, case-by-case analysis regarding restricting access under section 4.70(a).

*Judicial Work Product*: This category is intended to exclude public access to work product involved in the court decisional process, as opposed to the decision itself. This would include such things as notes and bench memos prepared by staff attorneys, draft opinions and orders, opinions being circulated between judges, etc. Any specification about this should include independent contractors working for a judge or the court, externs, students, and others assisting the judge but who are not employees of the court or the clerk of court's office.

*Court Administration and Clerk of Court Work Product*: The type of information here could include information collected, and notes, drafts and other work product generated during the process of developing policy relating

to the court's administration of justice and its operations or the operation of the clerk of court. The exception is intended to cover the "work product" and "deliberative process" but not the final policy, decision or report as defined in section 3.10(a)(3). In some states the clerk of court function is provided by an executive branch agency, often by an elected clerk. Because the activity concerns the court, these *CCJ/COSCA Guidelines* apply to such offices even though they may be part of the executive branch.

Another category of court work product is the notes produced by court reporters, whether in paper form or electronic form (from a CAT system). Whereas the transcript produced from notes is a public record, the state or court should address whether the notes themselves are publicly accessible.

Other non-case specific information in court administration records that some jurisdictions have excluded from general public access include:

Telephone logs of judges and court staff;

Logs of Internet access by judges and court staff;

Minutes of Judges' meetings; and

E-mails or other correspondence of judges and court staff.

*Certain Court Administration Records*: This category of information relates to court personnel, litigation involving the court, and court security. This category includes certain information whose release would infringe generally accepted privacy protections for court staff or job applicants, compromise the safety of judges, court staff and those that visit the courthouse, or compromise the integrity of the court's information technology and record keeping systems. Court personnel information could include:

Personnel and medical records of court employees;

Information related to pending internal investigations of court personnel (including attorney discipline) or court activities;

Applicants for positions in the court; and

Personal identifier information about people applying or serving as unpaid volunteers to assist the court, such as serving as a guardian ad litem, court-appointed special advocate for a child, etc.

Information about court litigation could include:

Information about pending litigation where the court is a party (and the

information has not become part of the record in the case); and

Work product of any attorney or law clerk employed by or representing the judicial branch that is produced in the regular course of business or representation of the judicial branch.

Information about court security could include:

Court security plans and procedures;

Logs of arrival and departure times of judges or court staff kept by court security systems;

Records of when judges are scheduled to be on leave;

Court information system cabling and network diagrams;

Security information related to the court's information technology capabilities; and

Software used by the court to maintain court records, whether purchased, leased, licensed or developed by or for the court.

*Proprietary Interest of the government*: This category is intended to protect information that is the property of a state or local government entity that, if it were owned by a business, would be subject to the protection of the law. The intent is to provide the government the same level of protection as is provided to businesses. Examples of information here would be computer software developed by the government, and reports or collections of information that are protected from disclosure by state statute or information owned by state or individual governmental units constituting trade secrets or whose release would otherwise infringe on the government's proprietary interests.

**Section 4.70 – Requests To Prohibit Public Access to Information In Court Records Or To Obtain Access to Restricted Information**

**(a) A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. The court must decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider at least the following:**

**(1) Risk of injury to individuals;**

**(2) Individual privacy rights and interests;**

**(3) Proprietary business information; and**

**(4) Public safety.**

**In restricting access the court will use the least restrictive means that will achieve the purposes of the access policy and the needs of the requestor.**

**(b) A request to obtain access to information in a court record to which access is prohibited under section 4.60 or 4.70(a) of these *CCJ/COSCA Guidelines* may be made by any member of the public or on the court's own motion upon notice as provided in subsection 4.70(c). The court must decide whether there are sufficient grounds to continue to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider at least the following:**

**(1) Risk of injury to individuals;**

**(2) Individual privacy rights and interests;**

**(3) Proprietary business information;**

**(4) Access to court records; and**

**(5) Public safety.**

**(c) The request shall be made by a written motion to the court. The requestor will give notice to all parties in the case except as prohibited by law. The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under section 4.60(a), the court will provide notice to the individual or entity that requested that access be prohibited either itself or by directing a party to give the notice.**

*Commentary*

This section lays out the basic considerations and processes for prohibiting access to otherwise publicly available information (often referred to as sealing), or opening access to restricted information (whether prohibited under section 4.60 or section 4.70(a)). Requests to restrict remote public access, as opposed to prohibit public access altogether, are provided for in

section 4.50. The language incorporates the presumption of openness, and the need for sufficient grounds to overcome the presumption. The section also specifies the mechanism for making the request and directs the court to use the least restrictive approach possible when restricting public access.

The section specifically lists several of the policy interests stated in section 1.00 that the court is to consider in deciding whether there is an interest justifying restriction of, or providing, public access. The Advisory Committee was closely divided as to whether to list any specific policy interests in the subsections. The concern was to avoid creating the impression that any of these policy interests always constituted an interest warranting restricting or opening access, and also to avoid creating the impression that these were the only such interests; none may apply and there may be others. Moreover, the consideration needs to be made by the court on a case-by-case basis. The language in the subsections is intended to provide guidance in developing a policy. The intent of the *CCJ/COSCA Guidelines* is not to rewrite the law of each state regarding prohibition of access, nor is it practical to try and report the applicable law for each state, and the variations within each state based on type of information or type of case.

Subsection (a) allows anyone who is identified in the court record to request prohibition of public access. This specification is quite broad, including a witness in a case or someone about whom personally identifiable information is present in the court record, but who is not a party to the action. While the reach of the policy is quite broad, this is required to meet the intent of subsection 1.00(a)(6) regarding protection of individual privacy rights and interests, not just the privacy rights and interests of parties to a case. Protection is available for someone who is referred to in the case, but does not have the options or protections a party to the case would have.

Subsection (a) provides only for prohibiting access to information, not prohibiting access to the existence of the information. Section 4.10(b) specifically provides that the existence of information to which access is prohibited will be publicly accessible. A state or individual court considering adoption of an access policy should consider whether to expand this subsection to also allow prohibiting access to the existence of such information (see discussion in Commentary to section 4.10(b)).

Subsection (a) does not have any restrictions regarding when the request can be made, implying it can be done at any time.

This subsection provides that it is the judge who decides whether access will be prohibited. Even if all parties agree that public access to information should be prohibited, this is not binding on the judge, who must still make the decision based on the applicable law and factors listed.

The last paragraph to subsection (a) requires the court to seek an approach that minimizes the amount of information that cannot be accessed, as opposed to an "all or nothing" approach. This is directed at the question of what to do about a document or other material in the court record that contains some information to which access should be prohibited along with other information that remains publicly accessible. The issue becomes one of whether it is technically possible to redact some information from a document and to allow the balance of the document to be publicly available. Less restrictive methods include redaction of pieces of information in the record, sealing of only certain pages of a document, as opposed to the entire document, or sealing of a document, but not the entire file. As noted previously (see commentary under section 3.20) newer technologies permit tagging of information in an electronic records in a way that readily allows electronic redaction of pieces of information in an electronic document, and courts are encouraged to obtain this capability when acquiring new systems. As discussed in the commentary to section 4.10 other approaches to restricting access to names could include using initials or a pseudonym rather than a full or real name. As discussed in section 4.50, another approach might be to preclude remote access to information while retaining access at the courthouse.

In addition to whether it is technically possible, there may be an issue of whether it is feasible to redact information in a record, and whether the court or clerk has the resources to do so. The work needed to exhaustively review a large file or document to find information to be redacted may be prohibitive, such that access to the whole file or document would be restricted, rather than attempting redaction.

Subsection (b) specifically allows a court to consider providing access to information to which access is categorically prohibited under section 4.60, as well as specific information in a court record to which access has previously been prohibited by a court pursuant to section 4.70(a). Allowing a court to order public access to categorically prohibited information may currently not be possible in many states. Allowing later reconsideration of a court's prior decision to prohibit access in a particular case under section 4.70(a) may also be new. The basis for authorizing this is to address a possible change in circumstances where the reasons for prohibiting access no longer apply, have changed, or there is new information suggesting now allowing public access. Examples include such things as a person now being a "public figure," the conclusion of a trial, the passage of time reducing the risk of injury, etc. A state or local court considering adopting or revising its access policy should consider adding such provisions if it does not already have them.

Subsection (b) suggests an explicit standard and procedure for reviewing a previous decision to prohibit public access to information. A state or individual court considering adoption of an access policy should clearly define the standard and burden of proof for lifting a prohibition on access.

Subsection (b) provides that "any member of the public" can make the request for access to prohibited information. This term is defined broadly in section 2.00, and includes the media and business entities as well as individuals.

Subsection (c) contemplates a written motion seeking to prohibit, or gain, access. Although a motion is specified, the section is silent as to the need for oral argument or testimony, leaving this up to the court. Notice is required to be given to all parties by the requestor, except where prohibited by law.[17] The subsection gives the court discretion to require notice to be given to others identified in the information that is the subject of the request. If public access to the information was restricted by a prior request, the subsection requires the court to arrange for notice to be given to the person who made the prior request. The process for seeking review by an appellate court is not specified in the policy, as the normal appeal process for a judicial decision is assumed to apply.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

The section does not address what access is permitted between the time a request to prohibit access is made and the court rules on the request. This is particularly critical if the request is made simultaneously with the filing of the information. It is also more critical where the parties represent themselves and are unaware of appropriate procedures. A state or individual court considering adoption of an access policy might consider adding a provision that access will be prohibited to the extent requested during the time a request is pending before the court. In order to avoid the use of such a provision to achieve at least temporary restriction a court should establish procedures that provide for prompt consideration of a request to prohibit access. Alternatively a court could require that a party file a motion to prohibit access with the information to be protected in a sealed envelope being lodged, but not filed, with the court. If the court grants the request, the information can be filed with prohibition to access. If the request is denied, the party has the option of filing the information without prohibition of access, or not filing it.

The section does also not address possible remedies for violating prohibitions on access.

## When Accessible

### Section 5.00 – When Court Records May Be Accessed

[17] 18 USC § 2265(d)(1) – full faith and credit given to protective orders.

**(a) Court records will be available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.**

**(b) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time.**

*Commentary*

This section of the *CCJ/COSCA Guidelines* requires a court to specify when court records are accessible. The *CCJ/COSCA Guidelines* direct, as a minimum, that remote access be available at the same times as records are accessible at the courthouse. This section does not preclude or require "after hours" access to court records in electronic form. Courts are encouraged to provide access to records in electronic form beyond the hours access is available at the courthouse, with a goal of 24 hours a day, seven days a week. However, it is not the intent of the *CCJ/COSCA Guidelines* to require courts to expend money or other resources to make remote access possible outside of normal business hours. The section acknowledges that access to electronic records may occasionally not be available during normal business hours because of unexpected interruptions to information technology systems, crashes, and during planned interruptions such as for back-up of databases, software upgrades or maintenance, or hardware upgrades or maintenance.

Subsection (b) addresses the question of how quickly the information will be made available. There are a number of factors that can affect how quickly the court responds to a request and provides the information, assuming it is publicly accessible. The response will be slower if the request is non-specific, is for a large amount of information, is for information that is in off-site storage, or requires significant amounts of court resources to respond to the request. The objective is to have a prompt and timely response to a request for information.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

A state or individual court considering adoption of an access policy should consider adding provisions designating a custodian of the record to respond to requests, or denials of requests. The custodian (often designated as the information steward, chief information officer, chief privacy officer, or ombudsperson) would be the person responsible and accountable for the implementation of the access policy. There are many roles for the custodian,

from responding to requests for access, responding to denials of access, responding to requests for bulk access (under section 4.30) or compiled access (under section 4.40), determining or reviewing fees to be charged for access, or addressing perceived delays in fulfilling requests.

Designating a custodian would be especially important where there has been a history of problems regarding access, or denial of access. However, designating a custodian may introduce a delay or add a layer of bureaucracy in jurisdictions where there has not been a problem. Courts should educate all judges, court employees, and the clerk of court staff regarding the requirements of the *CCJ/COSCA Guidelines* (see section 8.30) and expect them to comply with the policies provision. Having one individual specifically responsible for responding to requests and complaints may cause other staff to feel they have been relieved from compliance with, and vigilance about, the *CCJ/COSCA Guideline*'s provisions. However, if there have been ongoing problems, designating an individual may be one way to address the problems and bring others into compliance.

Another issue that might be covered in an access policy is a provision that gives litigants or the public the ability to access information in electronic form where they do not currently have the ability or equipment to obtain access. If information is only available in electronic form, the court should provide terminals or computers in the courthouse through which the public can obtain access, or make the information available through public libraries or other information access sites. See also the Commentary to section 3.20 regarding equal access to information.

## Obligation of the Court to Inform and Educate

### Section 8.00 – Information and Education Regarding Access Policy

### Section 8.10 – Dissemination of Information to Litigants About Access To Information In Court Records

**The court will make information available to litigants and the public that information in the court record about them is accessible to the public, including remotely and how to request to restrict the manner of access or to prohibit public access.**

*Commentary*

This section of the *CCJ/COSCA Guidelines* recognizes that litigants may not be aware that information provided to the court, by them or other parties in the case, generally is accessible to the public, including, possibly, bulk

downloads. Litigants may also be unaware that some of the information may be available in electronic form, possibly even remotely. To the extent litigants are unrepresented, this problem is even more significant, as they have no lawyer who can point this out. To address this possible lack of knowledge, this section requires a court to inform litigants about public access to court records. Providing notice to all litigants may also lessen unequal treatment and inequity of access based on wealth.

This section also specifically requires the court to inform litigants of the process for requesting restrictions to the manner of access under section 4.50, and to inform litigants about how to request prohibition of public access to information in their case pursuant to section 4.70. This would be especially important in cases involving domestic violence, sexual assault, stalking, or requests for protective orders, and witnesses where there is a greater risk of harm to individuals. The court should also provide information about the unlikelihood of prohibiting access to some types of information.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

The *CCJ/COSCA Guidelines* do not specify how information will be provided, nor the extent or nature of detail required. These issues need to be addressed by a state or individual court adopting an access policy. There are several approaches to accomplishing this. The notice could be a written notice or pamphlet received when filing initial pleadings. The pamphlet could refer the litigant to other sources of information, including a web site. The court could also provide materials, including videotapes, through a self-help center or service, or an ombudsperson. Consideration should also be given to providing the information in several common languages. Finally, the court could encourage the local bar to assist in educating litigants.

Information provided to litigants could address the following issues:

- Any information a litigant includes in a document or other material filed
with the court in a case is open, with very few exceptions, to public access pursuant to applicable law, including any access policy;

- The information may be available remotely, such as by searching the courts database of information through the Internet;

- Any person may request access to the information filed with the court, regardless of the reason access is desired or the use that will be made of the information;

- Because there are few restrictions on what parties can say in documents filed with the court, there may be information accessible to

the public that you feel is inaccurate, incomplete, untrue or unsubstantiated; and

• Court records generally have very long retention periods, so the information in the records will be publicly available for a long time.

This section of the *CCJ/COSCA Guidelines* specifically requires the court to provide information to litigants, and to the public generally. Similar arguments can be made for informing jurors, victims, and witnesses that information about them included in the court record is publicly accessible. A state or individual court adopting a policy should consider including a provision to provide notice to these groups. While it is relatively easy to provide information to jurors, providing information to victims and witnesses is much more problematic, as often only the lawyers, or law enforcement agencies, not the courts, know who the victims and potential witnesses are, at least initially.

**Section 8.20 – Dissemination of Information To The Public About Accessing Court Records**

**The Court will develop and make information available to the public about how to obtain access to court records pursuant to these *CCJ/COSCA Guidelines*.**

*Commentary*

Public access to court records is meaningless if the public does not know how to access the records. This section establishes an obligation on the court to provide information to the public, which should include jurors, victims, witnesses and other participants in judicial proceedings, about how to access court records.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

This section does not specify how the public should be informed, or what information should be provided. There are a number of techniques to accomplish this, and a court may use several simultaneously. Brochures can be developed explaining access. Access methods can also be explained on court web sites. Tutorials on terminals in the courthouse or on web sites can be used to instruct the public on access without the direct assistance of court or clerk's office personnel.

Subjects the public could be informed about include: 1) why court records are open, 2) where and how to obtain access, 3) when access is available, 4) how to request access to restricted information, whether restricted categorically or by specific court order, and the criteria the court will consider

to allow access, 5) how to request restriction of access and the criteria the court will use to restrict access, 6) requests for bulk or compiled information, 7) possible fees for obtaining access or copies, and 8) consequences for misuse or abuse of access. If the court maintains logs of who requested information, this should be made known to users as well. Finally, it would be useful to point out to the public that the database is not 100% accurate, that there may be errors, and that the data may change as information is purged, sealed, or modified as time goes on.

**Section 8.30 – Education of Judges and Court Personnel About An Access Policy**

**The Court and clerk of court will educate and train their personnel to comply with an access policy so that Court and clerk of court offices respond to requests for access to information in the court record in a manner consistent with this policy.**

**The Presiding Judge shall insure that all judges are informed about the access policy.**

*Commentary*

This section mandates that the court and clerk of court educate and train their employees to be able to properly implement an access policy. Properly trained employees will provide better customer service, facilitating access when appropriate, and preventing access when access is restricted or prohibited. When properly trained, there is also less risk of inappropriate disclosure, thereby protecting privacy and lowering risk to individuals from disclosure of sensitive information. Training should also be provided to employees of other agencies, or their contractors, who have access to information in court records, for example as part of shared integrated criminal justice information systems.

The section also requires the Presiding or Chief Judge to make sure that judicial officers serving the court are aware of the local access policy and its implications for their work and decisions.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

One concern about court records is that the information in the records is accurate, timely, and not ambiguous. The problem exists equally with paper court records and court records in electronic form, but the possibility of broad scale access to electronic records heightens the risk. This risk is minimized if the court's practices for generating and maintaining the court record are sound, and the employees are well trained in the practices. Specific internal

court policies on accuracy and validation of data entry is not part of this policy, but should be addressed in internal policies and procedures.

The specifics of topics on which courts should instruct employees and judges are not included in these *CCJ/COSCA Guidelines*. Suggested subjects for employee and judge education include at least the following: 1) intent of the policy, 2) awareness of access and restriction provisions, including those governing employees of other entities, 3) appropriate response to requests for access, 4) process for requesting access or requesting restriction to access, 5) fees, 6) importance of timely and accurate data entry, and 7) consequences for misuse or abuse of access or improper release of restricted information. A court should also adopt personnel policy provisions indicating consequences for misuse, abuse or inappropriate disclosure of information in court records.

In addressing the means of access, the court or clerk of court should be mindful of complying with the Americans with Disabilities Act.[18] Means of access should be developed for those who are unable to access the information in electronic form just as they should be developed for paper records.

**Section 8.40 – Education About Process To Change Inaccurate Information in A Court Record**

**The Court will have a policy and will inform the public of the policy by which the court will correct inaccurate information in a court record.**

*Commentary*

Court records are as susceptible to errors or incomplete information as any other public record. This section requires that courts have a policy (whether a rule or statute) specifying the method for reviewing information in court records and making any changes or additions that will make the record more accurate or complete. This section of the *CCJ/COSCA Guidelines* requires the court to inform the public of its access policy. There may be different process for a "data entry" error, as opposed to other alleged errors in information.

*Issues Not Addressed in the CCJ/COSCA Guidelines*

These *CCJ/COSCA Guidelines* do not provide a standard for when information must be changed or supplemented. It is not the intent of the *CCJ/COSCA Guidelines* as drafted to create a method for modifying a court record; rather, the *CCJ/COSCA Guidelines* rely on existing procedures for

[18] Americans with Disabilities Act of 1990, 42 USC §§12101-12213.

introducing and challenging evidence or other information that is part of the court record.

The information provided to the public pursuant to this section should indicate: 1) that only a court order, not the clerk, nor a vendor, can make the change, 2) the criteria the court will use in deciding whether to change the record, 3) the likelihood of a change being made, and 4) that there will be a record of the request for the change as well as a record of what was changed.

**APPENDIX B**

Repeal the current Rules of Professional Conduct and replace them with the following:

# NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

## Statement Of Purpose

The Rules of Professional Conduct constitute the disciplinary standard for New Hampshire lawyers. Together with law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer conduct.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the context of legal representation and of law itself. Some of the Rules are imperatives, expressed by the terms "shall" or "shall not". Others, generally expressed by the term "may", are permissive and define areas in which the lawyer may exercise professional judgment.

The Rules are not designed to be a basis for civil liability. The purpose of the Rules can be subverted when the Rules are invoked by opposing parties as procedural weapons. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. Violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer from a position or from pending litigation. Nevertheless, as the Rules establish a standard of conduct for lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

The Rules of Professional Conduct are promulgated and amended by the Supreme Court of the State of New Hampshire with due input from members of the New Hampshire Bar and interested members of the public. Each Rule is published together with the applicable ABA Comment, as adopted by the American Bar Association in conjunction with its Model Rules of Professional Conduct. Following the ABA Comments may be found a New Hampshire Comment, which may describe distinctions between the Rule as adopted in New Hampshire and the respective ABA Model Rule. The ABA and New Hampshire Comments are intended to be interpretive, not mandatory. The New Hampshire Comments are provided by the Ethics Committee of the New Hampshire Bar Association.

Lawyers have traditionally aspired to higher standards of professionalism than should be made mandatory in the Rules. Professionalism encompasses civility, competence, conscience, contribution to the quality of the legal system including equal access to the courts, and public service.

**New Hampshire Comment**

The Statement of Purpose replaces the ABA Model Preamble and Scope in their entirety. The New Hampshire Supreme Court has not adopted the existing ABA Model Preamble and Scope, so that there is no base text to amend. The NHBA Ethics Committee found that, in both the existing and the proposed ABA Model Preamble and Scope, the following defects exist:

Much of the Preamble and Scope consists of imprecise restatements or summaries of the Rules, which are generally unnecessary, potentially confusing, or both.

It is inappropriate for the Statement of Purpose to attempt to codify when the Rules should or should not be used by disciplinary bodies, or how degrees of punishment for violations should be determined.

Portions of the Preamble and Scope are aspirational in nature, which runs the risk of converting goals into mandates. The Rules will succeed better if the distinction between worthy aspirations and basic mandates is kept clear.

The length and lack of clarity in the wording of the Preamble and Scope materially diminish their utility to their readers.

**Rule 1.0. Definitions**

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

**Rule 1.1. Competence**

(a) A lawyer shall provide competent representation to a client.

(b) Legal competence requires at a minimum:

(1) specific knowledge about the fields of law in which the lawyer practices;

(2) performance of the techniques of practice with skill;

(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;

(4) proper preparation; and

(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

(c) In the performance of client service, a lawyer shall at a minimum:

(1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;

(2) formulate the material issues raised, determine applicable law and identify alternative legal responses;

(3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and

(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

**New Hampshire Comment**

The New Hampshire Rule continues the prior New Hampshire Rule, expanding on the Model Rule to serve both as a guide and objective standard. The Model Rule standards of legal knowledge, skill, thoroughness, and preparation reasonably necessary are rejected as being too general.

**Rule 1.2. Scope Of Representation And Allocation Of Authority Between Client And Lawyer**

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent In providing limited representation, the lawyer's responsibilities to the client, the court and third parties remain as defined by these Rules as viewed in the context of the limited scope of the representation itself; and court rules when applicable.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means, for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, avoid the use of offensive or dilatory tactics, or treat opposing counsel or an opposing party with civility.

(f) In addition to requirements set forth in Rule 1.2(c),

(1) a lawyer may provide limited representation to a client who is or may become involved in a proceeding before a tribunal (hereafter referred to as litigation), provided that the limitations are fully disclosed and explained, and the client gives informed consent to the limited representation. The form set forth in section (g) of this Rule has been created to facilitate disclosure and explanation of the limited nature of representation in litigation. Although not prohibited, the provision of limited representation to a client who is involved in litigation and who is entitled as a matter of law to the appointment of counsel is discouraged.

(2) a lawyer who has not entered an applicable limited appearance, and who provides assistance in drafting pleadings, shall advise the client to

comply with any rules of the tribunal regarding participation of the lawyer in support of a pro se litigant.

(g) *Sample form.*

**CONSENT TO LIMITED REPRESENTATION**

**Limited Representation**

To help you in litigation, you and a lawyer may agree that the lawyer will represent you in the entire case, or only in certain parts of the case. "Limited representation" occurs if you retain a lawyer only for certain parts of the case.

When a lawyer agrees to provide limited representation in litigation, the lawyer must act in your best interest and give you competent help. However, when a lawyer and you agree that the lawyer will provide only limited help,

- the lawyer **DOES NOT HAVE TO GIVE MORE HELP** than the lawyer and you agreed.
- the lawyer **DOES NOT HAVE TO HELP** with any other part of your case.

If you and a lawyer have agreed to limited representation in connection with litigation, you should complete this form and sign your name at the bottom. Your lawyer will also sign to show that he or she agrees. If you and the lawyer both sign, the lawyer agrees to help you by performing the following **limited services**:

1. ☐ Provide you general advice about your legal rights and responsibilities in connection with potential litigation concerning:

_____

_____

which advice shall be provided as:

☐ consultation at a one-time meeting, or

☐ consultation at an initial meeting and further meetings, telephone calls or correspondence (by mail, fax or email) as needed, or as requested by you

2. ☐ Assist in the preparation of your court or mediation matter regarding

_____ by:

[Case name]

□ explaining court procedures

□ reviewing court papers and other documents prepared by or for you

□ suggesting court papers for you to prepare

□ drafting the following court papers for your use:

_____

_____

□ legal research and analysis regarding _____

□ preparation for court hearing regarding _____

_____; or

□ preparation for mediation

□ other: _____

3. □ Representing you in Court regarding _____,
[Case name]

**but only for the following specific matter(s):**

□ Motion for _____

_____

□ Temporary hearing

□ final hearing

□ trial

□ other: _____

_____

4. ☐ Other limited service:_____

_____

## Consent

I have read this Consent to Limited Representation Form and I understand what it says. As the lawyer's client, I agree that the legal services specified above are the **only** legal help this lawyer will give me. **I understand and agree that:**

- the lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me any more legal help
- the lawyer is not promising any particular outcome
- because of the limited services to be provided, the lawyer has limited his or her investigation of the facts to that necessary to carry out the identified tasks with competence and in compliance with court rules
- if the lawyer goes to court with me, the lawyer does not have to help me afterwards, unless we both agree in writing

I agree the address below is my permanent address and telephone number where I may be reached. I understand that it is important that my lawyer, the opposing party and the court handling my case, if applicable, be able to reach me at this address. I therefore agree that I will inform my lawyer or any Court and opposing party, if applicable, of any change in my permanent address or telephone number.

**A separate fee agreement** ☐ was ☐ was not also signed by me and my lawyer.

| | |
|---|---|
| _____ | _____ |
| [print or type your name] **Client's Name** | [print or type your full mailing street/apartment address] |
| _____ | _____ |
| [sign your name] | [print or type City, State and Zip Code] |
| _____ | _____ |
| **Date** | [print or type your Phone Number] |
| _____ | _____ |
| [print or type your name] **Lawyer's Name** | [print or type name of law firm] |

[sign your name]

[print or type Street, City, State and Zip Code]

**Date**

[print or type your Phone Number]

## New Hampshire Comment

1. This rule differs from the ABA Model Rule by:

Deleting the last two sentences of ABA Model Rule 1.2 (a).
Adding a second sentence to Rule 1.2( c).
Adding a new 1.2(e).
Adding a new 1.2(f).
Adding a new 1.2(g).

2. The deleted sentences of ABA Model Rule 1.2 (a) provide as follows:

"A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

The particular binding client decisions articulated in the third sentence of Rule 1.2(a) are by no means exclusive. There will obviously be other important client decisions that will be binding upon the lawyer depending upon the fact specific circumstances of any representation. The Model Rule sentences correctly state those particular client decisions that are binding upon the lawyer. However, specifically including these in the Rule may be wrongly construed by a lawyer to be the ***only*** binding decisions that can be made by a client. A lawyer must always carefully consider all client requests or decisions, in light of all relevant factors, including but not limited to, the particular fact pattern, type of representation, a client's social and economic considerations, and the scope of representation and earlier decisions reached during the representation. *See, e.g.,* Restatement Third, The Law Governing Lawyers § 21 ("Allocating the Authority to Decide Between a Client and a Lawyer"), § 22 ("Authority Reserved to a Client"), and § 23 ("Authority Reserved to a Lawyer") (2000).

3. The second sentence of Rule 1.2(c) confirms that lawyers providing limited representation are bound by all professional responsibility rules. The Rule also recognizes that these ethical obligations will need to be interpreted, or

analyzed, within the context of the limited representation. One example of such an obligation could be the duty, under Rule 1.1(c)(3), to "develop a strategy, in collaboration with the client, for solving the legal problems of the client." A client who retains an attorney for limited purposes may simply want the lawyer to research and provide the applicable law in a specific area, thereby making Rule 1.1(c)(3) inapplicable. Conversely, the lawyer's duty pursuant to Rule 4.1(a) not to make false statements to third persons is the type of fundamental obligation that would remain applicable regardless of the limits placed on the scope of representation.

4. The added provision in Rule 1.2 (e), restates a rule revision that has been adopted (in various forms) in several other states. Especially in light of a growing concern by New Hampshire practicing lawyers for the professionalism of lawyers, it is appropriate to make a distinction between following client objectives during representation, and the general civility and professionalism expected by all practicing New Hampshire attorneys. The lawyer should also be guided by The New Hampshire Lawyer Professional Creed, adopted April 4, 2001, by the New Hampshire Bar Association Board of Governors (which can be found under “NH Practice Guidelines” on the Bar’s website, www.nhbar.org).

5. A new section (f) is added to apply specific rules for the limited representation of a client in a litigation setting, which would require full disclosure and informed consent. A recommended written Consent to Limited Representation form for compliance with this provision, while not mandated, is provided in section (g). Subsection (f)(2) requires the lawyer to advise the client to comply with whatever applicable court rules may apply, with respect to any "ghost written" pleadings prepared by that lawyer who is not actually involved, by appearance, in the particular litigation.

## Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

### New Hampshire Comment

The former New Hampshire Rule 1.3 contained additional language further defining promptness and diligence. Those additional factors, while not exhaustive, continue to be instructive with respect to the compliance with this rule. Those factors include carrying out representation in the manner and within the time parameters established by the agreement between the client and the lawyer; however the lawyer may not rely upon the terms of an agreement to excuse performance which is not prompt and diligent in light of changes in circumstances, known to the lawyer, which require adjustments to the agreed upon schedule of performance. Additionally, in all other matters of representation, it is to be carried out with avoidable harm neither to the client's interest nor to the lawyer-client relationship.

## Rule 1.4. Client Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter.

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

### New Hampshire Comment

Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.2. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rules 2.2 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.

**Rule 1.5. Fees**

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee or expenses include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) the fee customarily charged in the locality for similar legal services.

(4) the amount involved and the results obtained.

(5) the time limitations imposed by the client or by the circumstances.

(6) the nature and length of the professional relationship with the client.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) whether the fee is fixed or contingent; and

**[Since the Committee has not reached consensus on whether Rule 1.5(b) should be revised to require a written fee agreement, the Committee presents alternate versions:]**

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

**[OR]**

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing. This paragraph does not apply in any matter in which it is reasonably foreseeable that the total cost to a client, including attorney fees, will be _____ or less.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or these rules. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses for which the client will be liable whether or not the client is the prevailing party, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) (1) A lawyer shall not enter into an arrangement for, charge, or collect any fee in a divorce or other domestic relations matter, which is contingent on:

a. securing a divorce;

b. establishing or modifying a child support, alimony, property division, or other financial order; or

c. obtaining any specific non-financial relief.

(2) However, a contingent fee arrangement is permissible, subject to 1.5(c) above, in domestic relations matters regarding:

a. enforcing a property division order or an accrued obligation for child support or alimony;

b. enforcing any other financial order; or

c. obtaining a property division of assets hidden during the divorce.

(e) A lawyer shall not enter into an arrangement to charge or collect a contingent fee for representing a defendant in a criminal case.

**[Since the Committee has not reached a consensus on whether naked referral fees should be allowed, two alternate versions of Rule 1.5(8) are presented:]**

**[Alternative 1]**

(f) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client agrees in writing to the division;

(2) the division is made in reasonable proportion to the services performed or responsibility or risks assumed by each, and

(3) the total fee charged by all lawyers is not increased by the division of fees and is reasonable.

**[New Hampshire Comment to (f) alternative 1]**

Paragraph (f)(2) justifies the division of a fee under the "responsibility or risks assumed" language when an attorney actively participates in a matter, and disallows so-called "naked" referral fees. In an October, 1997 Practical Ethics opinion, the New Hampshire Bar Association Ethics Committee determined that in order to satisfy the "active participation" criteria of Paragraph (f)(2), a referring attorney must, at a minimum, conduct a client interview, evaluate the needs of the client in the matter, identify the potential issues in the matter, and discuss the benefit of a referral with the client prior to a referral. In the absence of active participation, an attorney dividing a fee under (f)(2) must assume the risk of professional liability with the other lawyers.

**[Alternative 2: Proposed Modification to Existing NH Rule Permitting Fee Referral Without Regard to Services Performed or Risks Assumed]**

(f) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is made either:

a. in reasonable proportion to the services performed or responsibility or risks assumed by each, or

b. based on an agreement with the referring lawyer;

(2) in either case above, the client agrees in a writing signed by the client to the division of fees;

(3) in either case, the total fee charged by all lawyers is not increased by the division of fees and is reasonable.

**[New Hampshire Comment to (f) alternative 2]**

The New Hampshire rule differs markedly from the ABA Model Rule because it allows so-called "naked" referral fees. The ABA Model Rule allows a division of a fee between lawyers not in the same law firm only where each lawyer actively participates in a matter or assumes joint responsibility and risk for the representation of the client. The New Hampshire rule changes this requirement and allows a division of fee with a forwarding lawyer, regardless of the work performed or responsibility assumed, provided that the client consents in writing to the division of fees and the total fee is not increased because of the fee division and is reasonable. This change from the ABA Model Rule and from the previous New Hampshire rule is intended to facilitate the association of alternate counsel in order to best serve the client and is often but not exclusively used when the division is between a referring lawyer and a trial lawyer.

**New Hampshire Comment**

The language used in Rule 1.5(a) is substantially the same as proposed ABA Model Rule 1.5(a) and changes the prior rule in two respects. First, it replaces the prior rule's standard prohibiting a "clearly excessive fees" with the ABA Model Rule standard of an "unreasonable fee." This change reflects the fact that a "reasonableness" standard defines a lawyer's obligation to the client with respect to other aspects of their relationship governed by the Rules of Professional Conduct. See, for example, Rules 1.3(a), 1.4(a), 1.8(a), and 3.2. There is no sound policy or other reason why the reasonableness standard should not govern legal fees and expenses. As the Statement of Purpose notes, "[t]he Rules of Professional Conduct are rules of reason." Whether a fee is reasonable is subject to independent determination. Indeed, the eight factors listed in Rule 1.5(a) all bear on ascertaining the reasonableness of a fee, not whether the fee is "clearly excessive." *See In Re Kelley's Case*, 137 N.H. 314, 320 (1993) (under prior rule 1.5(a) to determine whether fee is "clearly excessive," a "generally accepted, reasonable fee" must first be determined); Restatement (Third) of the Law Governing Lawyers § 46 (proposed official draft 1998) (lawyer prohibited from charging a fee "larger than is reasonable under the circumstances").

Changing the standard under Rule 1.5(a) from "clearly excessive" to "unreasonable" raises the issue of the potential impact of a decision in a fee-shifting case that rejects a portion of the fee application as being unreasonable. This raises a concern as to whether such a ruling would pave the way for a misconduct complaint under Rule 8.4(a) since "professional misconduct" is defined to include a violation or an attempt to violate the Rules of Professional Conduct.

The New Hampshire Supreme Court has stated that "legislative authorizations for the granting of attorney's fees usually are based upon an intent to permit private parties to enforce a law as 'private attorneys general' and the realization that in many non-class action cases the verdict or damages often may be offset or even exceeded by the successful plaintiff's attorney fees." *Couture v. Mammoth Grocers, Inc.*, 117 N.H. 294, 295 (1977). In reviewing awards under fee-shifting statutes, the Court has consistently looked to rule 1.5(a), or its predecessor, to determine whether an award is reasonable. *E.g., McCabe v. Arcidy*, 138 N.H. 20 (1993); *In Re Estate of Rolfe*, 136 N.H. 294 (1992); *City of Manchester v. Doucet*, 133 N.H. 680 (1990); *Couture v. Mammoth Grocers, Inc., supra*. But in doing so, the Court has made clear that fee agreements "do not dictate the amount of attorney's fees recoverable" because the fee-shifting statute "allow[s] the court to exercise its discretion in determining a reasonable fee." *Cheshire Toyota/Volvo, Inc. v. O'Sullivan*, 132 N.H. 168, 171 (1989). The Court has noted that the fee arrangement is "but one of a number of factors for a court to consider in determining a reasonable fee," *id.*, and that "[t]here can be no rigid, precise measure of reasonableness, however, because the weight accorded each factor depends on the circumstances of each particular case." *McCabe*, 138 N.H. at 29.

Although unstated, the Court's approach in fee-shifting cases also appears to reflect the notion that the amount of fees the adverse party should bear may well differ from the amount the client should reasonably be expected to pay. In any event, none of the cases contains even a hint that a rejection of a portion of the application might raise the specter of a misconduct complaint.

Federal fee-shifting statutes serve the same general purpose as New Hampshire statutes: to encourage attorneys to take cases that otherwise might not be economically feasible or attractive. *See generally* The Civil Rights Attorneys Fees Awards Act of 1976, H.R. Rep. No. 94-1588, at 3 (1976). But awards may not produce a windfall for attorneys. *See generally* S. Rep. No. 94-1011, at 6 (1976).

The United States Supreme Court has recognized that "billing judgment" is as important in fee-shifting cases as in the private sector: "'Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting *from Copeland v. Marshall*, 641 F.2d 880, 891 (1980) (*en banc*)). Yet, the *Hensley* court stated that multiplying "reasonable hours times a reasonable rate" is only one consideration in determining a proper statutory award. *Id.* Courts also must consider whether the relief obtained is "significant," and even if significant whether the relief "is limited in comparison to the scope of the litigation as a whole." *Id.* at 440. Further, work on unsuccessful claims, even if reasonable, usually may not be considered, nor may an award be made where the documentation is inadequate. *Id.* at 433-

434. Finally, the Court has made clear that in determining reasonableness "the most critical factor is the degree of success obtained." *Id.* at 436.

Given the purposes of fee-shifting statutes, the New Hampshire Supreme Court has made clear that the determination of a reasonable fee is based on considerations that go beyond private fee agreements so the award reflects the policies served by such statutes. Its approach is consistent with federal law. For this reason, and in the absence of any reported decision in which a ruling in a fee-shifting case has been cited to support a misconduct complaint, there is only a minimal risk that adoption of an unreasonable standard would prejudice an attorney against whom a complaint of professional misconduct has been filed because a court had determined a portion of the fees was unreasonable. That minimal risk must be weighed against the benefit to be gained by adopting an unreasonable standard. Simply stated, the "clearly excessive" standard is indefensible. A lawyer should not be able to collect a fee that is unreasonable or excessive. Such a standard is neither fair to the client nor justifiable. Moreover, to permit a lawyer to charge and collect an unreasonable or excessive fee is unseemly, reflects poorly on the legal profession, and does not serve the public interest in promoting access to legal services in a country founded on the rule of law. See ABA Formal Opinion 93-379 ("A lawyer should not charge more than a reasonable fee, for excessive costs of legal service would deter a laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client"). Finally, it is difficult to imagine any argument that could be made to defend such a fee, which the public would understand, let alone accept. While how lawyers are viewed by the public cannot be the sole yardstick by which lawyer conduct is measured, in the area of legal fees it should be a paramount consideration.

The second change to Rule 1.5(a) is that it has been revised to make explicit that a lawyer may not charge an unreasonable amount for expenses for which the client is responsible. This change in the text of the rule, which is consistent with the opinions of state ethics committees, is not intended to change the substance of the prior rule. *See* ABA Formal Opinion 93-379.

## Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or.

(4) to comply with other law or a court order.

### New Hampshire Comment

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer’s individual conscience may dictate.

**Rule 1.7. Conflicts of Interest**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

**New Hampshire Comment**

The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is exists a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. *See Fiandaca v. Cunningham*, 827 F.2d. 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used under the old rules the "harsh reality test" which states:

"(i)f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to

this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this "harsh reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation . . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

**Rule 1.8. Conflict Of Interest: Current Clients: Specific Rules**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

**New Hampshire Comment**

ABA Comment 8 raises concerns. In New Hampshire, Rule 1.8(a) applies to a lawyer's advice as to, or preparation of, an instrument designating or appointing a lawyer or an affiliate of the lawyer as executor, trustee or any other fiduciary position (whether or not a family relationship exists). *See also* New Hampshire Bar Association Ethics Committee opinion 1987-88/9 (http://www.nhbar.org/pdfs/FO87-88-9.pdf) and *In re Estate of Rolfe,* 136 NH 294 (1992), 615 A 2d 625.

## Rule 1.9. Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

### New Hampshire Comment

The New Hampshire Supreme Court has relied upon this rule for the criteria governing the consideration of a motion to disqualify a party's former lawyer for a conflict of interest. *Sullivan County Reg. Refuse Disp. Dist. v. Town of Acworth*, 141 N.H. 479, 481-82 (1996).

Law firms and legal service organizations which handle a high volume of cases confront the limitations of this rule on a more frequent basis than do other practitioners. Firms and organizations may accept cases where a former client is a witness in the new (current client's) case if the representation of the former client is not “substantially related” to the current client’s case. Rule 1.9(a) permits such representation, but attorneys are cautioned to fully explore the definition of "substantially related" under relevant case law in the controlling jurisdiction. If such representation is permissible, attorneys in the law firm or organization must nevertheless take appropriate steps in a case that is not

substantially related to comply with Rule 1.9(c) by protecting the confidential information obtained during the representation of the former client.

The New Hampshire Public Defender has adopted a Rule 1.9(c) compliance policy in cases that are not substantially related in which a "neutral attorney" orders the former client's files sealed and prohibits any communication between the attorney who represented the former client and the attorney who represents the new client. In two cases where the State sought disqualification of the Public Defender because one of its attorneys had previously represented an individual who was a state's witness in the new case, the New Hampshire Superior Court denied disqualification and referenced with apparent approval the Public Defender's Rule 1.9(c) compliance policy. *See State of New Hampshire v. Gordon Perry*, Nos. 97-S-777 - 780 (Merrimack County Superior Court (Nadeau, J.) April 10, 1998); *State of New Hampshire v. Eric Smalley*, No. 01-S-1280 (Merrimack County Superior Court (McGuire, J.) January 29, 2002).

## Rule 1.10. Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

### New Hampshire Comment

The disqualification of lawyers associated in a firm with former government lawyers is governed by Rule 1.11(b) and (c).

The disqualification of lawyers associated in a firm with a lawyer-official is governed by Rule 1.11A(c).

**Rule 1.11. Special Conflicts Of Interest For Former And Current Government Officers And Employees**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

a. participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless

the appropriate government agency gives its informed consent, confirmed in writing; or

b. negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding involving a specific party or parties, including an application, request for ~~a~~ ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other proceeding; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

**New Hampshire Comment**

1. New Hampshire reordered the language in ABA Model Rule 1.11(e)(1) to clarify that the term "matters covers only proceedings, judicial or otherwise, involving specific parties and not general proceedings such as rulemaking or regulation.

2. In determining whether a lawyer is subject to the prohibition under section (d), a number of factors should be taken into account. These factors include, but are not limited to, whether the lawyer supervised or primarily handled a matter, whether material progress had been achieved in the matter and whether the matter was reassigned before any substantive review or tasks had been conducted. In some cases, a lawyer's supervisory status over matters handled in a public office may make it impossible to negotiate for private employment unless the public employment is terminated prior to such negotiation. In most instances, however, recusal from matters in which the potential employer is involved would be sufficient to avoid the appearance of a conflict of interest.

3. It should be noted that public offices, agencies, boards and commissions may have internal policies regarding conflicts of interest, which in some instances are more restrictive than the New Hampshire Rules of Professional Conduct.

**Rule 1.11A. Conduct Of Lawyer-Officials**

(a) Definitions. As used in this rule:

*lawyer-official* means a lawyer actively engaged in the practice of law, who is a member of a governmental body;

*governmental body* means any state or local governmental agency, board, body, council or commission, including any advisory committee established by any of such entities;

*related body* means a governmental body whose members are appointed or elected by the lawyer-official or the governmental body of which the lawyer-official is a member;

*interest* means a direct, personal and pecuniary interest, individually or on a client's behalf, in a matter which is under consideration by either the governmental body of which the lawyer-official is a member, or by a related body; and

*advisory committee* means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

(b) No lawyer-official shall:

(1) participate in any hearing, debate, discussion or vote, or in any manner otherwise attempt to influence the outcome of a matter in which the lawyer-official has an interest;

(2) utilize information obtained in such capacity for his or her own personal benefit or that of his or her clients or the clients of the firm with which the lawyer-official is associated;

(3) appear on behalf of a client before any governmental body of which the lawyer-official is a member or any related body;

(4) accept anything of value from any person or organization when the lawyer-official knows or reasonably should know that the offer is for the purpose of influencing the lawyer-official's actions or decisions as a lawyer-official;

(5) use his or her official position to influence or to attempt to influence either the governmental body of which the lawyer is a member or a related body to act in favor of the lawyer-official or the lawyer-official's clients or clients of the firm with which the lawyer-official is associated.

(c) Other lawyers in the firm with which the lawyer-official is associated may appear on behalf of clients before the governmental body of which the lawyer-official is a member, , if the lawyer-official publicly disqualifies himself or herself and refrains from participation in the matter in accordance with paragraph (b)(1) of this Rule. Other lawyers in the firm with which the lawyer-official is associated may appear on behalf of clients before a related body, if either (i) the lawyer-official has refrained from and continues to refrain from participation in any action regarding the appointment of members of the related body, or (ii) all relevant parties give their informed consent. At all times, however, the lawyer-official shall conduct himself or herself with respect to the matter in question in accordance with paragraph (b) of this Rule.

**New Hampshire Comment**

This Rule was not considered by the ABA. Service by members of the New Hampshire Bar to state and local government should be encouraged. This Rule is intended to facilitate rather than limit the opportunities of attorneys to serve on state and local governmental bodies. However, lawyers should not overlook the complexities inherent in obtaining consents pursuant to Section (c) of this Rule.

## Rule 1.12. Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

### New Hampshire Comment

The New Hampshire Rule does not provide an exception for consent by all parties to representation by a lawyer of a party in connection with a matter in which the lawyer formerly held an adjudicative position.

## Rule 1.12A. Part-Time Judge

A lawyer who serves as a part-time judge may not practice in a court where he or she regularly serves as a part-time judge.

### New Hampshire Comment

Rule 1.12A has no Model Rule counterpart, and amends the existing New Hampshire Rule to apply only to part-time judges practicing in a court where he or she *regularly* serves as judge.

**Rule 1.13. Organization As Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

**New Hampshire Comment**

In New Hampshire, a lawyer who represents an unincorporated association also represents each individual member of the association as to matters of association business. *Franklin v Callum*, 148 NH 199 (2002). This rule is an exception to the prevailing "entity theory" of representation reflected in Rule 1.13. *See also* Restatement of the Law Governing Lawyers § 96 (ALI 2000); *McCabe v Arcidy,* 138 N.H. 20, 26 (1993).

## Rule 1.14. Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

### New Hampshire Comment

1) ABA Comment 3 says that the presence of family members or other persons during discussions with the lawyer, at the clients request "generally does not affect the applicability of the attorney-client evidentiary privilege." This comment raises concerns. The lawyer should determine if the privilege would be waived.

2) ABA Comment 5 addresses consulting with traditional "family members." For some clients, non-traditional relationships such as unmarried heterosexual, gay, or lesbian partners may be at least as important as blood or marital relationships. There may be substantial conflict between the non-traditional partner and the traditional family. Evidence of the importance of a particular relationship to the client would include express client directions set out in planning documents such as letters of intent, health care or general power of attorney, or nomination of guardian.

3) ABA Comment 7 highlights that the least restrictive action should be taken, based upon the circumstances of each client. This is consistent with the approach of New Hampshire's probate courts, in considering a guardianship over an incapacitated adult.

4) ABA Comment 4 says that the lawyer would "ordinarily look to" any legal representative (such as a guardian) for decisions. The situations in which the

client's legal representative should **not** be the person making decisions are limited to two situations: where the lawyer represents the client in a matter against the interests of the legal representative or where that the legal representative instructs the lawyer to act in a manner that will violate that person's legal duties toward the client. *See* Restatement Third, The Law Governing Lawyers § 24(c) (2000).

5) ABA Comment 10 states that "[n]ormally, a lawyer would not seek compensation for such emergency actions taken." In these situations there is no ethical bar to requesting compensation, where the person benefiting from the action can afford to pay for the legal services.

**Rule 1.15. Safekeeping Property**

(a) Property of clients or third persons which a lawyer is holding in the lawyer's possession in connection with a representation shall be held separate from the lawyer's own property. Funds shall be deposited in one or more clearly designated trust accounts in accordance with the provisions of the New Hampshire Supreme Court Rules. All other property shall be identified as property of the client, promptly upon receipt, and safeguarded.

(b) Records shall be maintained by the lawyer of the handling, maintenance and disposition of all funds and other property of the client at any time in the lawyer's possession from the time of receipt to the time of final distribution and shall be preserved for a period of six years after final distribution of such funds or other property or any portion thereof. The lawyer shall maintain the minimum financial records specified in the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules.

(c) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount appropriate for that purpose.

(d) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(e) Funds may be disbursed from lawyer trust accounts upon (A) (i) deposit, receipt of which is acknowledged by the receiving financial institution, of cash, bank cashier's check, certified check, or electronic transfer of funds at least equal to the sum of such disbursements, or (ii) clearance of any other form of deposit by such receiving financial institution, and (B) availability of such funds to the lawyer from the receiving financial institution.

(f) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and upon request by the client or third person, shall promptly render a full accounting regarding such property.

(g) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

## New Hampshire Comment

New Hampshire Supreme Court Rule 50(2)B provides that: all cash property of clients received by attorneys shall be deposited in one or more clearly designated trust accounts (separate from the attorney's own funds) in financial institutions. Any attorney depositing client funds into an out-of-state financial institution shall file a written authorization with the Clerk of the Supreme Court authorizing the Court or its agents to examine and copy such out-of-state account records. Under no circumstances may an attorney use out-of-state banks other than those located in Maine, Vermont or Massachusetts.

Paragraphs (a) and (b), which differ from ABA Model Rule 1.15(a), were drafted with the provisions of Rule 50 in mind, especially, 50(2)B. Paragraphs (c), (d), (f), and (g) follow the language of ABA Model Rule 1.15 (b), (c), (d) and (e).

With respect to the broader question regarding retention of client files generally, see Practical Ethics: Ethical Considerations and the Retention of Client Files (http://nhbar.org/pdfs/PEA3-99.pdf, 1999). That article discusses an amendment to the New Hampshire Rules of Professional Conduct, proposed in 1997 but never formally approved, providing that client files be retained for at least six years or beyond any applicable period of statute of limitations on actions, whichever is longer. The article concludes that "an attorney's analysis of whether, when, and how to discard a client or former client's file materials must begin and end with the attorney's continuing obligation to avoid prejudicing the client's interest, Rule 1.16(d)." The article also incorporates the Guidelines For Client File Retention/Disposition found in ABA Informal Opinion 1384.

While ABA Model Rule 1.15 describes the circumstances under which funds must be deposited in a lawyer's trust account, it does not specify when funds may be disbursed. This issue arises most frequently when the deposited funds are received via check or other negotiable instrument. Because funds are frequently received in this manner and oftentimes must be immediately disbursed to third parties as an integral part of transactions that lawyers are engaged in on behalf of their clients, needed guidance in this area is provided in paragraph (e). See generally RSA 382-A:3-411 which supports this treatment of bank cashier's and certified checks.

Rule 1.15 (d) provides that funds may only be withdrawn from a trust account when fees are "earned" or expenses are "incurred." This new rule, while implicitly recognizing that so-called flat fees and minimum fees are both permissible, raises questions about when such fees have been "earned" for purposes of transfer from a trust account to an attorney's business or operating account (or perhaps directly into a personal account). While the commentators offer no clear, universal rule to guide attorneys in this difficult

area, they do generally agree that Rule 1.5's requirement that any fee must be reasonable is the overarching principle governing all fee issues.[1] Because this requirement may necessitate the return of some portion of a flat or minimum fee when the lawyer cannot complete representation because of conflict or other early termination of the attorney/client relationship, many commentators believe that such fees should be considered "earned" only when work of comparable value has been performed. This view is based upon a client protection model which is designed to ensure that fees which must be returned under Rule 1.5 are retained in the lawyer's trust account. While recognizing that some commentators favor treating flat fees as "earned" upon receipt when there is a clear written fee agreement to that effect, the more prudent course is for lawyers to deposit all flat fees or minimum fees into their trust accounts to be periodically withdrawn only upon a determination that the value of services provided is in reasonable proportion to the percentage of the total fee withdrawn.

The question of non-refundable, earned upon receipt retainers was addressed in Doherty's Case, 142 N.H. 446 (1997) in the context of bankruptcy court proceedings. In that case, the bankruptcy court had found that in a bankruptcy proceeding there was no such thing as a non-refundable, earned upon receipt retainer and a lawyer's failure to segregate a client's retainer into a separate client trust account violated Rule 1.15(a)(1). The attorney admitted to this violation and the Supreme Court affirmed the referee's ruling that the attorney had violated Rule 1.15(a)-(c).

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[1] Rule 1.5 does not permit a retainer for services that is absolutely non-refundable because such a fee agreement is inconsistent with the Rule's requirement that a fee must always be reasonable. However, the use of a general retainer, sometimes referred to as a "classic retainer" or an "engagement retainer," continues to be recognized as permissible by most commentators. This retainer reflects an agreement between attorney and client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform, at an agreed upon price, legal services of a specified or general type that arise during a specified time period. Because this retainer is given in exchange for availability and not for the rendition of legal services, it is deemed to be earned when paid.

**Rule 1.16. Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) As a condition to termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice of the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding

any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

(e) he representation of a lawyer having entered a limited appearance as authorized by the tribunal under a limited representation agreement under Rule 1.2(f)(1), shall terminate upon completion of the agreed representation, without the necessity of leave of court, upon providing notice of completion of the limited representation to the court.

**New Hampshire Comment**

Section (e) is unique to New Hampshire, and is intended to encourage limited representation.

**Rule 1.17. Sale Of Law Practice**

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if each of the following conditions is satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, within the State of New Hampshire;

(b) The entire practice, or the entire area of practice (subject to the clients' rights under Rule 1.17(c)(2)), is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the active and inactive clients of the practice or practice area being sold regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(d) The fees charged clients shall not be increased by reason of the sale***;***

(e) If a client cannot be given notice described in section (c), the representation of that client shall be transferred to the successor lawyer or law firm for the limited purpose of protecting the interests of that client as and to the same extent as the selling or prior lawyer was required to do by these Rules, and the successor lawyer or law firm shall have a continuing obligation to reasonably attempt to provide the client with such notice to the same extent as may be required by these Rules; and

(f) The successor lawyer or law firm shall take possession of all the inactive or archival files of the practice or practice area being sold, and shall store, handle, or destroy them in accordance with the normal operating procedures of the successor lawyer or law firm and these Rules. Notice of the transfer of the inactive and archival files shall be published in an appropriate newspaper of local circulation and shall be provided to the New Hampshire Bar Association.

**New Hampshire Comment**

Subsection (a) of the Rule permits the sale of a private practice or an area of private practice only if the seller ceases to engage in practice or in an area of practice within the State. Thus the requirements for sale are not met if the

lawyer or law firm desires to relocate to another area of the State. The individual clients' files may be transferred to the successor lawyer or law firm as and when client consents are received. After the expiration of the 90 day notice period, the files of all clients who have been given notice, and who have not opted either to retain other counsel or to take possession of their files, shall be transferred to the successor lawyer or law firm.

Subsection (e) departs from the ABA Model Rule by requiring the successor lawyer or law firm to take possession of the files of clients for whom consent could not be obtained, and by eliminating the need for prior court authorization. Such files shall be transferred for the limited purposes of attempting to effect actual written notice and protecting the clients' interests. Such file transfers are considered to be in the clients' best interests, and are not considered to violate Rule 1.6.

New subsection (f) clarifies that the successor lawyer's obligations with respect to inactive or archival files of the prior lawyer mirror the duties owed to the successor's own clients and former clients.

## Rule 1.18. Duties To Prospective Client

(a) A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received and reviewed information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received and reviewed disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received and reviewed the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

b. written notice is promptly given to the prospective client.

### New Hampshire Comment

1. The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who "discusses" possible representation with an attorney. Similarly, ABA Model Rule 1.18(b) establishes a general rule for protection of information received in "discussions" or "consultations".

In its version of these provisions, New Hampshire's rule eliminates the terminology of "discussion" or "consultation" and extends the protections of the

rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection.

2. Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a "prospective client" within the meaning of paragraph (a).

3. New Hampshire has concerns with ABA Comment 5, which purports to allow an attorney to secure prior "informed consent" from a prospective client that information provided in initial consultations would not preclude subsequent representation of another client in the matter. Unlike the more detailed analysis contemplated by Comment 22 to Rule 1.7, a prospective client's prior consent may be made more quickly and less likely to be "informed" as to the potential adverse consequences of such an agreement..

**Rule 1.19. Disclosure of Information to the Client**

(a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.19 of the New Hampshire Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
(Attorney's signature)

CLIENT ACKNOWLEDGMENT

I acknowledge receipt of the notice required by Rule 1.19 of the New Hampshire Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
(Client's signature)

Date: _____

## New Hampshire Comment

New Hampshire Rule 1.19 is not drawn from the ABA Model Rules.

**Rule 2.1. Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

**Rule 2.2. [the Committee recommends repeal of Rule 2.2]**

**Rule 2.3. Evaluation for Use by Third Persons**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

## Rule 2.4. Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform all parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

### New Hampshire Comment

1. The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. N.H. Superior Court Rule 170(E).

2. The lawyer serving as third-party neutral should explain the specific dispute resolution process he or she is using.

## Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or institutionalization, may nevertheless so defend the proceeding as to require that every element of the case be established.

### New Hampshire Comment

Institutionalization is treated as comparable to incarceration for purposes of Rule 3.1.

## Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

## Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

### New Hampshire Comment

1. New Hampshire's Rule reverses the order of ABA Model Rules (c) and (d). This clarifies that a lawyer's disclosure obligation during an *ex parte* proceeding applies even if the information provided to the tribunal would otherwise be protected by Rule 1.6.

2. See Rule 3.9 regarding nonadjudicative proceedings.

**Rule 3.4. Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

**Rule 3.5. Impartiality and Decorum of the Tribunal**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

**Rule 3.6. Trial Publicity**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

a. the identity, residence, occupation and family status of the accused;

b. if the accused has not been apprehended, information necessary to aid in apprehension of that person;

c. the fact, time and place of arrest; and

d. the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

**Rule 3.7. Lawyer As Witness**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work unreasonable hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

## Rule 3.8. Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

## Rule 3.9. Advocate In Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a), (b) and (d), 3.4(a) through (c), and 3.5.

### New Hampshire Comment

See also Rule 1.11A.

## Rule 4.1. Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

## Rule 4.2. Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

### New Hampshire Comment

The ABA Comments have noted that when an organization – a corporation, governmental body, or other entity – is the represented person, certain organizational personnel will be "off-limits" under Rule 4.2. This issue has frequently been the subject of litigation. The ABA Comments adopt what is known as the managing-speaking test. Several other tests have been used, known as the control group test, the blanket ban, the alter ego test and the balancing test. The New Hampshire Supreme Court has not ruled on this matter.

While not controlling on the question of permissible *ex parte* contact with employees of a corporate opponent, it is worth noting that New Hampshire has adopted the control-group test for purposes of applying the attorney-client privilege in the corporate setting. *See* N.H. R. Evid. 502(a)(2); *Klonoski v. Mahlab*, 1996 U.S. Dist. LEXIS 20360 n.2, *rev'd. on other grounds* 156 F.3d 225 (1st Cir. 1998).

**Rule 4.3. Dealing With Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

## Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

### New Hampshire Comment

Paragraph (a) substantially differs from the ABA model rule by using the word "obvious" to set a higher objective standard.

Paragraph (b) differs from the ABA model rule in three respects: the broader term "materials" replaces "document;" the phrase "reasonably should know" is deleted setting an objective standard for "knowledge"; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, "Inadvertent Disclosure of Confidential Materials." The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

**Rule 4.5. Subpoenas**

A lawyer shall not issue or obtain the issuance of a subpoena without good cause.

**New Hampshire Comment**

Rule 4.5 continues the existing New Hampshire Rule, for which there is no Model Rule counterpart.

## Rule 5.1. Responsibilities Of Partners, Managers, And Supervisory Lawyers

(a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### New Hampshire Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of “each” for “a” in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

**Rule 5.2. Responsibilities Of A Subordinate Lawyer**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

## Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) Each partner, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) Each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### New Hampshire Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of “each” for “a” in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

## Rule 5.4. Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

### New Hampshire Comment

New Hampshire permits a lawyer to share legal fees, whether or not court-awarded, with a nonprofit entity pursuant to Rule 5.4(a)(4).

**Rule 5.5. Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer admitted in another United States jurisdiction who acts in this state pursuant to subparagraphs (c) or (d) shall not hold himself or herself out as being admitted to practice in this State and shall not solicit clients in New Hampshire.

**New Hampshire Comment**

Rule 5.5(e) is unique to New Hampshire.

## Rule 5.6. Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

## Rule 5.7. Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

### New Hampshire Comment

Rule 5.7 identifies the circumstances in which all of the Rules of Professional Conduct continue to apply to lawyers even when the lawyer is not providing legal services to the person, or customer, for whom the law-related services are performed. Even when those circumstances do not exist, however, the lawyer will remain subject to those overarching rules that apply generally to lawyers regardless of the context. This would include - - by way of example only - - Rule 8.4(c)'s prohibition of "conduct involving dishonesty, fraud, deceit or misrepresentation," Astles' Case, 134 N.H. 602 (1991), and Rule 1.9's prohibition on the use against a former client of confidential information gained in the representation of the client, Wood's Case, 137 N.H. 698 (1993).

## Rule 6.1. Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render an appropriate number of hours, consistent with the lawyer's circumstances, of pro bono publico legal services each year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of such legal services, consistent with the lawyer's expertise and interests, without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

### New Hampshire Comment

New Hampshire's Rule differs from the ABA Model Rule as follows:

- in the second sentence, by deleting the reference to a specific number (such as 50) of aspirational hours of pro bono service, and in its place, inserting "an appropriate number of hours, consistent with the lawyer's circumstances"; and
- in (a), by deleting the reference to the 50 hours, and inserting "such legal services consistent with the lawyer's expertise and interests".

While a specific number of hours—such as 50—does provide an admirable goal for the lawyer, given the great diversity of circumstances among the practicing lawyers in this State, the "appropriate number" of hours that each lawyer

should provide will vary depending upon each lawyer's situation. And as noted in ABA Comment 1, the amount of time will also vary from year to year, again based upon the circumstances of each lawyer. Consequently, no set number of hours is incorporated in the New Hampshire Rule.

There are many factors that will reasonably impede a lawyers compliance with the preferred delivery of pro bono services as provided in (a). As stated in ABA Comment 5, there may be, in fact, practice situations that prevent a lawyer's ability to participate in such services. By further adding the clarification "consistent with the lawyer's expertise and interests" the New Hampshire Rule recognizes that an attorney's specific practice area and competence may also affect compliance with this provision, or the manner of compliance (as illustrated in ABA Comments 2 and 3).

The elimination of a specific number of aspirational hours of pro bono service, or the added clarification in (a), however, should not in any way dilute the attorney's professional responsibility, clearly stated in the first sentence of this Rule, "to provide legal services to those unable to pay".

**Rule 6.2. Accepting Appointments**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

## Rule 6.3. Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

## Rule 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially affected by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

### New Hampshire Comment

Rule 6.4 has been changed from the ABA model rule substituting the word "affected" for the word "benefitted" in the second sentence. Since situations may arise in which law reform activities may materially impinge on a client's interest in an adverse, as well as beneficial manner, the change was made to reflect that possibility.

## Rule 6.5. Nonprofit And Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by the New Hampshire Bar Association, a nonprofit organization or court, provides one-time consultation with a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Rules 1.6 and 1.9(c) are applicable to a representation governed by this Rule.

**New Hampshire Comment**

1. New Hampshire's version differs from the Model Rule as follows:

a. Application of this Rule in (a) is limited to a "one time consultation with a client" instead of the ABA's version "short-term limited legal services to a client".

b. Section (c ) is added.

2. The change in (a) is intended to give the attorney some clarity as to the scope of this Rule. This Rule relaxes certain of the normal conflicts limitations to allow this important pro bono service; this Rule applies only under circumstances where it is not reasonably possible for the attorney to otherwise comply with normal conflict of interest records checks procedures. Therefore, the situation where an attorney provides repeated services for the same client, and not a "one time consultation", would not permit any deviation from the normal conflicts rules.

3. The addition of Section (c) is intended simply to emphasize the attorney's continuing responsibility to maintain confidences under Rule 1.6, and the attorney's duties to a former client under Rule 1.9(c). This inclusion raises this language, already contained in ABA Comment [2], to Rule status.

4. The value of the services rendered to the public in this pro bono context is important enough to justify carving out a special exception to the normal conflicts rules applicable in general client representation. In this special context, not even the protective "screening" rules, such as those adopted in 1.11(b), were employed.

5. Should a lawyer participating in a one-time consultation under this Rule later discover that the lawyer's firm was representing or later undertook the representation of an adverse client, the prior participation of the attorney will not preclude the lawyer's firm from continuing or undertaking representation of such adverse client. But the participating lawyer will be disqualified and must be screened from any involvement with the firm's adverse client. *See* ABA Comment [4].

## Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Without limiting the generality of the foregoing, a communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, considered in light of all of the circumstances, not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

**New Hampshire Comment:**

The 2002 version of ABA Model Rule 7.1 eliminated subsections (a)-(c) of the former version of the Model Rule in favor of a more general prohibition on false or misleading communications. The New Hampshire rule retains subsections (a)-(c) because of the specific guidance they provide to the practitioner. At the same time, the New Hampshire rule adopts the general prohibition on false or misleading communications and provides explicitly that the subsections of the rule are illustrative, not limiting. New Hampshire Rule 7.1(a) also maintains the provision of the predecessor New Hampshire rule that a determination of whether a communication is materially misleading must be made "in light of all the circumstances."

## Rule 7.2. Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay a fee charged by an organization that is recognized by the Internal Revenue Service as exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code; and

(3) purchase a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

### New Hampshire Comment

The New Hampshire Rule differs from both the prior New Hampshire Rule and the Model Rule. Section (b)(2) limits the class of nonprofit entities to which referral fees may be paid to those that have obtained tax recognition of exemption. Model Rule (b)(4) is deleted.

**Rule 7.3. Direct Contact With Prospective Clients**

(a) A lawyer shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment, unless the person contacted:

(1) is a lawyer;

(2) has a family, close personal, or prior professional relationship with the lawyer;

(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or

(4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.

(b) A lawyer shall not communicate or knowingly permit any communication to a prospective client for the purpose of obtaining professional employment if:

(1) the prospective client has made known to the lawyer a desire not to receive communications from the lawyer;

(2) the communication involves coercion, duress or harassment; or

(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the word "Advertising" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in subsection (a).

(d) The following types of direct contact with prospective clients shall be exempt from subsection (a):

(i) participation in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live voice or other real-time contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(ii) initiation of contact for legal services by a non-profit organization.

(iii) contact of those the lawyer is permitted under applicable law to seek to join in litigation in the nature of a class action, if success in asserting rights or defenses of the litigation is dependent upon the joinder of others; and

(iv) requests by a lawyer or the lawyer's firm for referrals from a lawyer referral service operated, sponsored or approved by a bar association, or cooperation with any other qualified legal assistance organization.

**New Hampshire Comment**

New Hampshire Rule 7.3 differs from the Model Rule primarily in that:

1. It broadens the scope of potentially regulated contact to include initiation of any contact with a prospective client for the purpose of obtaining professional employment. The occurrence of actual "solicitation" raises evidentiary issues that are not necessary to reach.
2. It reinstates recorded contact as a regulated conduct, recognizing the growth of interactive recording technologies that may cause the prospective client to feel immediate pressure to respond.
3. It allows that motivators other than pecuniary gain may account for abusive conduct.
4. It assumes that entities, or individuals in a commercial context, will generally hold a more favorable balance of sophistication and leverage relative to the lawyer than will individuals acting outside of a commercial context, and so will generally need less protection against the "private importuning of the trained advocate." However, that balance is assumed to be negated for entities or individuals in a commercial context if they are known to be in need of legal services in a particular matter. This negation is intended to prohibit such activities as trolling through lists of new lawsuits and contacting defendants to solicit representation in the lawsuit.
5. Initiation of contact on behalf of class action and non-profit groups enjoy limited exemptions recognizing that such contact may be constitutionally protected.
6. Participation in a qualified legal services referral program is exempted.

## Rule 7.4. Communications of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and

(c) a lawyer who is certified as a specialist in a particular field of law by an organization that has been accredited by the American Bar Association may hold himself or herself out as a specialist certified by such organization.

### New Hampshire Comment

The New Hampshire version reorganizes and clarifies the language of the Model Rule.

## Rule 7.5. Firm Names And Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

(c) Identification of the lawyers in an office of a law firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(e) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

### New Hampshire Comment

The New Hampshire version separates Model Rule section (b), which contained two topics not necessarily related, into sections (b) and (c).

**Rule 7.6. [the Committee recommends non-adoption of ABA Model Rule 7.6.]**

**New Hampshire Comment**

Review of ABA Model Rule 7.6 is deferred and may be visited later. The Model Rule does not appear to have achieved general acceptance in other states.

## Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

(c) fail to attend a hearing when ordered to do so by a disciplinary authority.

### New Hampshire Comment

Rule 8.1(c) is retained from the prior New Hampshire Rules.

**Rule 8.2. Judicial and Legal Officials**

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

## Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information received by lawyers during the course of their work on behalf of the New Hampshire Bar Association Ethics or Lawyers Assistance Committees.

### New Hampshire Comment

Subsection (c) has been changed to permit members of the Lawyers Assistance Committee and the Ethics Committee of the New Hampshire Bar Association to refrain from disclosing information received by them during the course of their committee work. Lawyers are encouraged to seek assistance from these bodies.

## Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

### New Hampshire Comment

Section (d) of the ABA Model Rule is deleted. A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.

Model Rule section (e) is split into New Hampshire sections (d) and (e).

**Rule 8.5. Disciplinary Authority; Choice of Law; Application of Rules to Nonlawyer Representatives**

(a) *Disciplinary Authority.* A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer admitted in another jurisdiction but not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(c) *Application of Rules to Nonlawyer Representatives.* Rules 1.2, 1.3, 1.4, 1.14, 1.15, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 4.2, 4.3, 4.4, 8.2(a), and 8.4 of the Rules of Professional Conduct shall apply to persons who, while not lawyers, are permitted to represent other persons before the courts of this jurisdiction pursuant to RSA 311:1. The committee on professional conduct shall have jurisdiction to consider grievances alleging violations of these Rules of Professional Conduct by nonlawyer representatives.

**New Hampshire Comment**

Section (c) is added to extend the disciplinary authority of the Rules to nonlawyers acting as legal representatives pursuant to New Hampshire law.

**APPENDIX C**

Repeal the Rule 6.1 of the Professional Conduct and replace it with the following:

## RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

### New Hampshire Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the

most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the

remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

**APPENDIX D**

Adopt new Superior Court Rule 97-A as follows:

## JOINDER OF OFFENSES

97-A. (I) Joinder of Offenses.

(A) Related Offenses. Two or more offenses are related if they:

(i) are alleged to have occurred during a single criminal episode; or

(ii) constitute parts of a common scheme or plan; or

(iii) are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

(B) Joinder of Related Offenses for Trial. If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.

(C) Joinder of Unrelated Offenses. Upon written motion of a defendant, or with the defendant's written consent, the trial judge may join for trial two or more charges of unrelated offenses upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interest of justice.

(II) Relief from Prejudicial Joinder. If it appears that a joinder of offenses is not in the best interests of justice, the judge may upon his or her own motion or the motion of either party order an election of separate trials or provide whatever other relief justice may require.

**APPENDIX E**

Adopt new District Court Rule 2.9-A as follows:

**Rule 2.9-A. Joinder of Offenses**

(A) Joinder of Offenses.

(1) Related Offenses. Two or more offenses are related if they:

(i) are alleged to have occurred during a single criminal episode; or

(ii) constitute parts of a common scheme or plan; or

(iii) are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

(2) Joinder of Related Offenses for Trial. If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.

(3) Joinder of Unrelated Offenses. Upon written motion of a defendant, or with the defendant's written consent, the trial judge may join for trial two or more charges of unrelated offenses upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interest of justice.

(B) Relief from Prejudicial Joinder. If it appears that a joinder of offenses is not in the best interests of justice, the judge may upon his or her own motion or the motion of either party order an election of separate trials or provide whatever other relief justice may require.

**APPENDIX F**

Amend Supreme Court Rule 37(3)(c) by adding a new subsection 37(3)(c)(15); and amend Rule 37(19) by amending the title and adding new subsections 37(19)(b), 37(19)(c), 37(19(d), and 37(19)(e).

1. Adopt new subsection 37(3)(c)(15) as follows:

(15) To issue discretionary monetary sanctions against a disciplined attorney in the form of the assessment of costs and expenses pursuant to Rule 37(19).

2. Amend Rule 37(19) so that as amended it shall state as follows:

(19) ***Monetary Sanctions:*** **Expenses** ***Relating to Discipline Enforcement:***

(a) All expenses incurred by the attorney discipline system in the investigation and enforcement of discipline may, in whole or in part, be assessed to a disciplined attorney to the extent appropriate.

(b) Following any assessment, the professional conduct committee shall send a written statement of the nature and amount of each such expense to the disciplined attorney, together with a formal demand for payment. The assessment shall become final after 30 days unless the disciplined attorney responds in writing, listing each disputed expense and explaining the reasons for disagreement. If the parties are unable to agree on an amount, the professional conduct committee may resolve and enforce the assessment by petition to the superior court in any county in the state.

(c) A final assessment shall have the force and effect of a civil judgment against the disciplined attorney. The professional conduct committee may file a copy of the final assessment with the superior court in any county in the state, where it shall be docketed as a final judgment and shall be subject to all legally-available post-judgment enforcement remedies and procedures.

(d) The superior court may increase the assessment to include any taxable costs or other expenses incurred in the resolution or enforcement of any assessment. Such expenses may include reasonable

attorney's fees payable to counsel retained by the committee to resolve or recover the assessment.

(e) Any monetary assessment made against a disciplined attorney shall be deemed to be monetary sanctions asserted by the professional conduct committee or the applicable court against such attorney.

**APPENDIX G**

Amend Supreme Court Rule 37A(I)(e)(1) by adding a new subsection 37A(I)(e)(1)(F); and amend Rule 37A(III)(d)(2)(C)(v) by adding a new sentence to the end of the subsection.

1. Adopt new subsection 37A(I)(e)(1)(F) as follows:

(F) Monetary Sanctions Pursuant to Rule 37(19) – by the professional conduct committee or the court.

2. Amend 37A(III)(d)(2)(C)(v) so that as amended it shall state as follows:

(v) assess to a disciplined attorney to the extent appropriate, in whole or in part, expenses incurred by the attorney discipline system in the investigation and enforcement of discipline. An assessment made under this section shall have the same force, effect and characterization and shall be subject to the same procedures for finalization, resolution and enforcement as an assessment under Rule 37(19).

**APPENDIX H**

Amend Supreme Court Rule 38 either as set forth in Alternative No. 1 or as set forth in Alternative No. 2 below:

## Alternative No. 1

Amend Supreme Court Rule 38, Section B of the Application of the Code of Judicial Conduct, to read as follows (new matter is shown in bold; deleted matter is shown in strike-out mode):

B. All retired judges ~~eligible for recall to judicial service~~ **who have elected to take senior active status or who wish to serve as judicial referees or temporary justices of the supreme court** shall comply with the provisions of this Code governing part-time judges **and shall not engage in alternative dispute resolution for compensation in the private sector**.

## Alternative No. 2

Amend Supreme Court Rule 38, Canon 4(F) of the Code of Judicial Conduct as follows (new matter is shown in bold; deleted matter is shown in strike-out mode):

F. Service as Arbitrator or Mediator.

**(1) Except as provided in subsection 2 below,** a judge shall not ~~act as an~~ **provide services as a private** arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

**(2) A judge who is in senior active service pursuant to RSA 493-A:1 or who has reached age 70 but continues to sit as a judicial referee pursuant to RSA 493-A:1-a may serve as a private mediator or arbitrator, and may be privately compensated for such services, in a case in which the judge is not presiding only if the senior judge or judicial referee is certified as a mediator pursuant to Superior Court Rule 170. Such senior judge or judicial referee may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge or referee may in no way advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes his or her mediation services.**

**A senior judge or judicial referee shall not serve as a mediator in any case in which he or she is or has presided or in which he or she has ruled upon any issues other than routine scheduling matters.**

**If a mediator who is a senior judge or judicial referee has presided over a case involving any party to the mediation, the mediator shall disclose this fact to all parties and counsel prior to the mediation.**

**A senior judge or judicial referee shall disclose if he or she is being utilized or has been utilized as a mediator by any party, attorney or law firm involved in the case pending before the senior judge or judicial referee. Absent express consent from all parties, a senior judge or judicial referee is prohibited from presiding over any case involving any party, attorney or law firm that is utilizing or has utilized the senior judge or judicial referee as a mediator within the previous three years. A senior judge or judicial referee also shall disclose any negotiations or agreements for the provision of mediation services between the senior judge or judicial referee and any of the parties or counsel to the case.**

**(3) The provisions of subsections (1) and (2) above do not apply to a judge, senior judge or judicial referee when performing mediation services for the judicial branch pursuant to Superior Court Rule 170-B.**

Amend Supreme Court Rule 38, Section B of the Application of the Code of Judicial Conduct, to read as follows (new matter is shown in bold; deleted matter is shown in strike-out mode):

> B. All retired judges ~~eligible for recall to judicial service~~ **who have elected to take senior active status or who wish to serve as judicial referees or temporary justices of the supreme court** shall comply with the provisions of this Code governing part-time judges**, except they shall comply with the provisions of Section 4F if they wish to serve as a private mediator or arbitrator for compensation.**

**APPENDIX I**

Adopt on a permanent basis the amendments to Supreme Court Rule 39 that were adopted on a temporary basis by supreme court order dated April 25, 2006. **No change is being proposed to the language of the currently-effective Rule 39**, which states as follows:

## RULE 39. COMMITTEE ON JUDICIAL CONDUCT

(1) *Authority*

Pursuant to the supreme court's constitutional and statutory authority, and to provide for the orderly and efficient administration of the Code of Judicial Conduct, Rule 38 of the Rules of the Supreme Court, there is hereby established a committee on judicial conduct.

(2) *Appointment of Committee*

(a) The committee on judicial conduct shall consist of eleven members and eleven alternate members. Alternate members may participate in committee proceedings only as specifically provided in this rule.

(1) One member and one alternate member who shall each be an active or retired justice of the superior court; one member and one alternate member who shall each be an active or retired district court judge; and one member and one alternate member who shall each be an active or retired probate court judge, all of whom shall be appointed by the supreme court.

(2) One member and one alternate member who shall each be a clerk of court and who shall be appointed by the supreme court.

(3) One member and one alternate member who shall each be a New Hampshire Bar Association member and who shall be appointed by the president of the New Hampshire Bar Association.

(4) One public member and one alternate public member, who shall not be a judge, attorney, clerk of court, or elected or appointed public official, shall be appointed by the president of the New Hampshire Bar Association.

(5) One public member and one alternate public member], who shall not be a judge, attorney, clerk of court, or elected or appointed public official, shall be appointed by the supreme court.

(6) Two public members and two alternate public members, who shall not be judges, attorneys, clerks of court, or elected or appointed public officials, shall be appointed by the Governor.

(7) One public member and one alternate public member, who shall not be a judge, clerk of court, or attorney, shall be appointed by the president of the Senate.

(8) One public member and one alternate public member, who shall not be a judge, clerk of court, or attorney, shall be appointed by the speaker of the House.

(b) *Committee Address*

The committee address shall be determined by the committee.

(3) *Terms of Office*

(a) The terms of the current members serving on July 1, 2005, shall continue until, and expire at the end of, the dates set forth below. The appointing authority who shall fill any vacancy for each current member is also set forth below.

| Current Member | Expiration Date | Appointing Authority |
|---|---|---|
| Alfred Catalfo, III, Esquire | July 1, 2005 | Bar President (public member position) |
| Harland W. Eaton | July 1, 2005 | Governor |
| Elizabeth Lown | July 1, 2005 | House Speaker |
| Jay Rosenfield | July 1, 2005 | Senate President |
| Hon. Raymond A. Cloutier | July 1, 2006 | Supreme Court (probate court judge position) |
| Hon. Douglas S. Hatfield | July 1, 2006 | Supreme Court (district court judge position) |
| Wilfred L. Sanders, Esq. | July 1, 2006 | Bar President (attorney member position) |
| Dr. Robert O. Wilson | July 1, 2006 | Governor |
| Hon. Patricia C. Coffey | July 1, 2007 | Supreme Court (superior court justice position) |
| Lawrence W. O'Connell | July 1, 2007 | Supreme Court (public member position) |
| Dana Zucker | July 1, 2007 | Supreme Court (clerk of court position) |

Each member serving on July 1, 2005, shall continue to serve as a member until his or her successor is appointed. The initial term of the first eleven members appointed after July 1, 2005, which may include appointments of members who were serving on July 1, 2005, shall be for a three-year term.

The initial term of all alternate members appointed shall be for three years.

(b) All terms after the initial appointments set forth in subparagraph (a) shall be for three years.

(c) A member may serve a maximum of three successive terms, all of which commenced after July 1, 2005. After the expiration of the member's third successive term, the member may not again be appointed to the committee, either as a member or as an alternate member, until three years after the date of the member's last day as a member of the committee. An alternate member may serve an unlimited number of terms as an alternate.

(d) If any appointing authority other than the supreme court fails to appoint a member or an alternate member to fill a vacancy for a period of three months following the date upon which notice is sent to the appointing authority informing the appointing authority of the vacancy, the supreme court may appoint a member or alternate member to fill the vacancy. The person appointed shall have the same qualifications as would have been required had the appointing authority filled the vacancy.

(4) *Vacancy and Disqualification*

(a) A vacancy in the office of the committee shall occur

(1) when the term of a member or alternate member expires; provided, however, that such member or alternate member shall continue to serve until his or her successor is appointed; or

(2) when a judge who is a member or alternate member of the committee ceases to hold the office which he or she held at the time of selection; or

(3) when a lawyer ceases to be in good standing in all jurisdictions where admitted to practice law, or is appointed to a judicial office or as a clerk of court; or

(4) when a public member or alternate public member becomes a lawyer, clerk of court, or a judge; or

(5) when a public member or alternate public member appointed by the Governor or the President of the New Hampshire Bar Association becomes an elected or appointed public official; or

(6) when a member or alternate member ceases to be domiciled in New Hampshire; or

(7) when a clerk of court who is a member or alternate member of the committee ceases to hold the office which he or she held at the time of selection; or

(8) when a member or alternate member is removed from office by the committee as provided in paragraph 10; or

(9) when a member or alternate member ceases to hold office by submitting his or her resignation to the committee or otherwise.

(b) A vacancy shall be filled by selection of a successor with the same qualifications as those required for the selection of his or her predecessor in office. A member or alternate member selected to fill a vacancy shall hold office for the unexpired term of his or her predecessor.

(c) No member shall participate in any proceedings before the committee involving his or her own conduct or the conduct of any other member. No alternate member shall participate in any proceedings before the committee involving his or her own conduct.

(d) No member or alternate member shall participate in any proceeding in which his or her impartiality might reasonably be questioned.

(e) Whenever a member is disqualified from participating in a particular proceeding, or is unable to participate by reason of prolonged absence or physical or mental incapacity, an alternate member may be assigned by the chair to participate in any such proceeding or for the period of any such disability, provided that said alternate member shall have been appointed by the same appointing authority as the member who is being replaced, and shall have the same qualifications as those required for the selection of the member who is being replaced. If, however, due to disqualification or incapacity, there is no alternate member who was appointed by the same appointing authority with the same qualifications who is able to participate, then the chair may assign any other alternate member to participate in the proceeding or for the period of the member's disability.

(5) *Expenses of the Committee and Staff*

(a) The committee's budget shall be a separate PAU within the judicial branch budget. The committee shall prepare its own budget request. The budget request and such additional information as may be requested shall be

submitted to the director of the administrative office of the courts for inclusion in the judicial branch budget request in the amounts requested. Expenses approved for payment by the committee shall be paid by the administrative office of the courts from funds appropriated for the judicial conduct committee.

(b) Members and alternate members shall serve without compensation for their services, but shall be reimbursed for necessary expenses incurred in the performance of their duties, subject to the availability of funds.

(c) The committee shall appoint an executive secretary and such other persons as may be necessary to assist the committee in its work. The executive secretary shall perform the duties and responsibilities prescribed by this rule and Supreme Court Rule 40, and such other duties and responsibilities as the committee may determine from time to time. He or she shall notify the appropriate appointing authority whenever a member's or alternate member's term expires or a vacancy in the office of the committee otherwise occurs. He or she shall receive all grievances, information, and inquiries, and process the same under the direction and supervision of the committee. The executive secretary shall maintain the committee's records, maintain statistics concerning the operation of the committee, and prepare an annual report of the committee's activities for presentation to the committee. He or she shall coordinate investigations ordered by the committee, and ensure that they are conducted discreetly and with dispatch. Subject to the direction and control of the committee, and subject to the availability of appropriated funds, the executive secretary shall have charge of the disbursement of expense funds. Generally, the executive secretary shall supervise the work of other personnel employed by the committee, direct the activities of the committee's office, and endeavor to keep members of the committee properly informed about its business.

(d) The committee may employ counsel. The duties of counsel shall be determined by the committee.

(e) The committee may employ such private investigators, experts and other personnel as the committee in its discretion deems necessary for the efficient discharge of its duties.

(f) The committee shall select its own office space, which should not be in the facilities of any branch of government.

(6) *Quorum and Chairperson*

(a) A quorum for the transaction of business by the committee shall be six members; provided, however, that no formal charges shall be instituted or unfavorable action taken against a judge except upon the affirmative vote of at least seven members. Except as otherwise provided in this rule or in Supreme

Court Rule 40, no act of the committee shall be valid unless concurred in by six of its members.

Members of the committee may participate in a meeting of the committee by means of a conference telephone or similar communications equipment, provided all persons participating in the meeting can hear each other. Participation by these means shall constitute presence in person at a meeting. These procedures shall not be used for hearings.

(b) If a quorum of the committee cannot be obtained by reason of the disqualification or absence of members thereof, the chair or the executive secretary may request that one or more alternate members act as a temporary replacement or replacements. Any such temporary replacement shall have been appointed by the same appointing authority and have the same qualifications as the member replaced.

(c) The committee shall designate the chair and vice-chair of the committee. The vice-chair shall act as chair in the absence of the chair. In the absence of both the chair and the vice-chair, the members present may select one among them to act as temporary chair.

(7) *Meetings of the Committee*

(a) Meetings of the committee shall be held at the call of the chair, the vice-chair, or the executive secretary or at the written request of three members of the committee.

(b) The committee may, by vote, establish regular or stated meeting dates.

(c) The business of the committee may be transacted by telephone, exchange of correspondence, or other informal poll of members, unless one or more members object; provided, however, that no formal charges shall be instituted or unfavorable action taken against a judge except upon deliberation and the affirmative vote of at least seven members who are physically present at a meeting of the committee.

(8) *Annual Report*

On or before March 1 of each year, the committee shall prepare a report summarizing its activities during the preceding calendar year. Upon approval of the report by the committee, a copy of the report shall be filed with the Governor, the president of the Senate, the speaker of the House, the chief justice of the supreme court, the chairpersons of the House and Senate Judiciary Committees, and shall be made available to the public.

(9) *Powers and Duties of the Committee*

The committee shall have the power and the duty:

(a) to consider and investigate the conduct of any judge, as that term is defined in Rule 40(2), within the jurisdiction of this court and may initiate an inquiry on its own motion in accordance with Rule 40(6) or undertake an investigation upon grievance or complaint filed by any person;

(b) to retain counsel as may from time to time be required to properly perform the functions prescribed by the committee, subject to the availability of appropriated funds;

(c) to retain such investigative and other personnel as the committee shall deem necessary, and to select its own office space, which should not be in the facilities of any branch of government, both subject to the availability of appropriated funds;

(d) to dismiss a grievance or complaint when the grievant lacks standing, the committee lacks jurisdiction over the grievance or complaint, the grievance or complaint is insufficient or there is insufficient cause to proceed, or the period of limitations set forth in Rule 40(4)(c) has expired;

(e) to dispose of a grievance or complaint by informal resolution or adjustment prior to the filing of formal charges or after a hearing on formal charges;

(f) to prepare and file a statement of formal charges when appropriate;

(g) to hold a public hearing on a statement of formal charges, during which hearing counsel shall have the burden of establishing by clear and convincing evidence a violation of the Code of Judicial Conduct;

(h) to institute disciplinary proceedings in the supreme court when appropriate;

(i) to educate the public on the general functions and procedures of the Committee.

(10) *Attendance at Meetings; Removal of Members*

(a) Committee members shall be expected to attend all meetings of the committee. The chair shall be authorized to excuse the attendance of committee members from any meeting for good cause. The chair is authorized to discuss with members whether continued service on the committee is justified when meetings are frequently missed.

(b) The chair, with the concurrence of a majority of the committee, shall be authorized to remove a member or alternate member for cause, including unexcused or frequent absences or serious violations of the rules governing the committee. Prior to any vote by the committee on removal, the chair shall provide the member or alternate member with a written statement of the reasons for which his or her removal is sought. The member or alternate member shall have the right to file a

written response within ten days, copies of which shall be provided to all other members of the committee by the executive secretary. The member or alternate member shall have the right to attend the meeting at which removal is sought, and to speak prior to the committee's vote. The committee may hold such further proceedings as it deems necessary in its sole discretion prior to voting on removal.

**APPENDIX J**

Adopt on a permanent basis the amendments to Superior Court Rules 201 to 202-E that were adopted on a temporary basis by supreme court order dated May 11, 2006. **No change is being proposed to the language of the currently-effective Rules 201 to 202-E,** which state as follows:

201. FORM FOR DECREES AND STIPULATIONS. Agreed upon or proposed decrees must be filed at all temporary or final divorce, legal separation or parenting hearings. Any temporary decree for divorce or legal separation must follow the format set forth in Superior Court Rule 202-C(I). Any final decree for divorce or legal separation must follow the format set forth in Superior Court Rule 202-C(II). Any temporary or final decree for parenting actions must follow the format set forth in Superior Court Rule 202-D. For all final default hearings, the moving party shall provide a copy of the proposed order to the other party at least thirty days before the hearing date.

202. SIGNING OF STIPULATIONS. All stipulations, agreements, and proposed decrees shall be typewritten and signed by the parties and, if represented by counsel, by attorneys for the parties. The court may accept handwritten stipulations or agreements provided the parties file a typewritten substitute with the court within ten days. A typewritten substitute does not need to contain signatures.

202-A. PARENTING PLANS.

(I) Parenting plans shall be filed in all divorce and legal separation actions where there are minor children, and in all parenting actions. Parents shall work together to agree upon as many provisions of the parenting plan as possible. Exceptions to the requirement that parents work together on parenting plans include cases where there is evidence of domestic violence, child abuse, or neglect, or as otherwise excused by the court.

(II) In any divorce, legal separation, or parenting action in which a temporary parenting order is requested, a temporary parenting plan must be filed at the temporary hearing.

(III) A final parenting plan must be filed at the final hearing in any final divorce or legal separation action where there are minor children, and in all final parenting actions.

(IV) Parenting plans must be filed in all actions to modify final parenting plans or prior final parenting-related orders issued in divorce, legal separation, or custody actions.

(V) Parties may use the parenting plan form provided by the court or may create their own parenting plan. However, parties who create their own parenting plans must adhere to the standard order of lettered paragraphs set forth at Superior Court Rule 202-B, Standard Order of Paragraphs for Parenting Plan.

(VI) All parenting plans required by this rule shall be filed as separate documents, signed by one or more parties.

(VII) For all actions requiring parenting plans, if a complete parenting plan is not agreed upon by the parties which includes every provision of the Standard Order of Paragraphs for Parenting Plan, a partially agreed-upon parenting plan, signed by the parties, and a proposed parenting plan for the remaining provisions must be filed by each party.

202-B. STANDARD ORDER OF PARAGRAPHS FOR PARENTING PLAN.

All parenting plans shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

(I) Decision Making Responsibility

- (1) Major Decisions
- (2) Day-to-Day Decisions
- (3) Other

(II) Residential Responsibility & Parenting Schedule

- (1) Routine Schedule
- (2) Holiday and Birthday Planning
- (3) Three-day weekends
- (4) Vacation Schedule
- (5) Supervised Parenting Time
- (6) Other Parental Responsibilities

(III) Legal Residence of a Child for School Attendance

(IV) Transportation and Exchange of the Child(ren)

(V) Information Sharing and Access, Including Telephone and Electronic Access

(1) Parent-Child Telephone Contact

(2) Parent-Child Written Communication

(VI) Relocation of a Residence of a Child

(VII) Procedure for Review and Adjustment of Parenting Plan

(VIII) Method(s) for Resolving Disputes

(IX) Other Parenting Agreements Attached

202-C. STANDARD ORDER OF PARAGRAPHS FOR TEMPORARY AND FINAL DECREES ON DIVORCE AND LEGAL SEPARATION.

(I) Temporary. All temporary agreements and proposed decrees shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

(1) Type of Case

(2) Parenting Plan and Uniform Support Order

(3) Tax Exemptions for Children

(4) Guardian ad Litem Fees

(5) Alimony

(6) Health Insurance For Spouse

(7) Life Insurance

(8) Motor Vehicles

(9) Furniture and Other Personal Property

(10) Retirement Plans and Other Tax-Deferred Assets

(11) Other Financial Assets

(12) Business Interests of the Parties

(13) Division of Debt

(14) Marital Home

(15) Other Real Property

(16) Enforceability after Death

(17) Restraints against the Property

(18) Restraining Order

(19) Other Requests

(II) Final. All final agreements and proposed decrees shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

(1) Type of Case

(2) Parenting Plan and Uniform Support Order

(3) Tax Exemptions for Children

(4) Guardian ad Litem Fees

(5) Alimony

(6) Health Insurance For Spouse

(7) Life Insurance

(8) Motor Vehicles

(9) Furniture and Other Personal Property

(10) Retirement Plans and Other Tax-Deferred Assets

(11) Other Financial Assets

(12) Business Interests of the Parties

(13) Division of Debt

(14) Marital Home

(15) Other Real Property

(16) Enforceability after Death

(17) Signing of Documents

(18) Restraining Order

(19) Name Change

(20) Other Requests

202-D. STANDARD ORDER OF PARAGRAPHS FOR DECREE ON PARENTING PETITION.

All agreements and proposed decrees in parenting actions shall be set forth in the following order of paragraphs. "N/A" may be used to denote paragraphs that do not apply to a particular situation.

(1) Parenting Plan and Uniform Support Order

(2) Tax Exemptions for Children

(3) Guardian ad Litem Fees

(4) Life Insurance

(5) Enforceability after Death

(6) Restraining Order

(7) Other Requests

202-E. PERSONAL DATA SHEET. At the time of filing any initial pleading or pleading that brings an action forward, the filing party shall, and the responding party may, file a completed personal data sheet. Should a party become aware of any change in addresses, telephone numbers, or employment during the pendency of a case or of any outstanding support order, that party shall notify the court of such change. Access to information contained in the personal data sheet shall be restricted to court personnel, the Office of Child Support, the court-appointed mediator, the guardian ad litem, the parties, and counsel unless a party has requested on the data sheet that it not be disclosed to the other party.

**APPENDIX K**

Amend Supreme Court Rule 55(5) as follows (new language to be added is in **bold**; current language to be deleted is in ~~strikethrough mode~~):

(5) Administration of the Fund. The Public Protection Fund shall be administered by a nine member committee, appointed by the President of the New Hampshire Bar Association with the approval of the association's Board of Governors, which committee shall include at least two public members. Five members shall constitute a quorum. All decisions of the committee shall be made by a majority of the members present and voting. The committee shall have the power to propose regulations to clarify the intent of this rule, which regulations shall become effective after review and approval by the court. Decisions of the committee as to whether or not to pay claims and the amount of payments shall be within the committee's discretion, subject to the annual limits stated above, and will be reviewable only for unsustainable exercise of discretion. **Any request for review of a decision of the committee shall be filed in writing with the New Hampshire Supreme Court within thirty days of the date of the committee's decision. In the event that a claimant seeks a review of a decision of the committee, the claimant shall mail or hand-deliver a copy of his or her request to the New Hampshire Bar Association at the same time as the claimant files the request with the supreme court. If the New Hampshire Bar Association wishes to participate in the review of the decision, it shall file an appearance in the matter within thirty (30) days of receipt of the request.** ~~Review of decisions of the committee shall be by a panel of three retired judges, appointed by the New Hampshire Supreme Court, whose d~~ **D**ecisions **of the New Hampshire Supreme Court** shall be final. Within 120 days after the end of each fund year, the New Hampshire Bar Association shall report to the court about the claims made, approved and paid, assessments received, income earned, and expenses incurred in the preceding fund year. Reasonable expenses incurred by the New Hampshire Bar Association in administering the fund, including overhead, staff time, and professional fees, shall be reimbursed by the fund as a cost of operation, subject to the review and approval of the court.

**APPENDIX L**

Adopt on a permanent basis Supreme Court Rule 21(6-A), which was adopted on a temporary basis by supreme court order dated May 11, 2006. **No change is being proposed to the language of the currently-effective Rule 21(6-A),** which states as follows:

(6-A). *Extensions of time to file briefs*.

(a) Unless the scheduling order states otherwise, any party may obtain an automatic extension of no more than fifteen days within which to file briefs (or memoranda of law) by filing an original and one copy of an assented-to notice of automatic extension of time. The notice shall affirmatively state that all parties assent to the extension, and the notice MUST set forth the new dates upon which all briefs (or memoranda of law) for all parties shall be due, including the date for reply briefs. No such date shall be extended by more than fifteen days. Upon the filing of the notice, the new briefing schedule set forth therein shall become effective without further order of the court.

(b) A maximum of two assented-to notices of automatic extension of time may be filed by the parties collectively. Thereafter, no additional extension of time will be granted by the court absent a showing of extraordinary circumstances.

(c) Extensions of time of more than fifteen days, or extensions when all parties do not consent, may be requested only by motion to the court. Extensions of more than fifteen days are not favored.